

# Texas Law Review

Volume 86, Number 4, March 2008

## Articles

### The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007

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I.	The Tangled History of the Voting Rights Act.....	670
A.	Latest Twists .....	670
B.	The Perils of Oversimplified, Partial Histories of Section 5.....	672
II.	Strange and Ironic: C. Vann Woodward's View of Race Relations and Southern History .....	674
III.	The Institutionalization of a Flexible Provision: From Selma to Mobile, 1965–1980 .....	678
A.	Proxy Disfranchisement and the Evolution of Reform .....	678
B.	Centralized Efficiency?.....	681
C.	Extension in Scope and Time.....	685
D.	From Indianapolis to New Orleans, via Dallas and San Antonio, with a Retrogression to Cincinnati.....	689
E.	Retreat to Mobile, in Confusion.....	697
F.	Washington Outlook: Overcast.....	703
IV.	Rebirth .....	704
A.	Renewal .....	704
B.	Reruns .....	713
C.	Redefinition.....	718
D.	Reward .....	721
V.	Redemption .....	724
A.	The Creation of an Era .....	724
B.	Reaction .....	725

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C. Double, Shifting Standards .....	726
D. Retrogression to Retrogression .....	732
E. O'Connor's Influence .....	737
VI. Caution and Duplicity: The 2006 Renewal of the Voting Rights Act ..	743
A. Ironies of Evidence .....	743
B. The Politics of Renewal .....	751
C. Defeat in Victory? .....	760
VII. Section 5 in Peril: The <i>NAMUDNO</i> Case .....	763
A. Miss Under Standing? .....	763
B. Moving the Policy Arguments to the Courts .....	765
C. If <i>NAMUDNO</i> Wins: The Frederick Douglass, Thaddeus Stevens, and Charles Sumner VRA Revival Act of 2009 .....	769
VIII. "History Can Move Backward" .....	774

*Strange events and ironic conjunctions pervade the narrative of the renewal of provisions of the Voting Rights Act 2005–2006. Never has the radical, still-controversial Act been treated in such hushed, reverential tones, and never has its discussion been so blatantly manipulated for immediate partisan advantage. Never have there been so many proposals for comprehensive changes when the temporary parts of the Act have come up for renewal, and never has there been less serious debate about the Act in committees and on the floor of Congress. Never has support for the Act in Congress and the country seemed so universal, and never has its constitutional future before the Supreme Court seemed so tenuous.*

*This Article shows that the strange, ironic nature of the recent consideration of the Voting Rights Act is not unusual, but rather that it is typical of the history of the most controversial provision of the Act, Section 5, which requires that all changes in election laws in “covered jurisdictions,” chiefly in the Deep South, be submitted to the Justice Department or the District of Columbia District Court for “preclearance” before they are allowed to go into effect. In its early years, Section 5 was largely ignored by state and local governments, and the Justice Department was too disorganized to police it, anyway. After receiving a judicial blessing from the Supreme Court, Section 5 was for the first time vigorously enforced by the Nixon Administration, which had opposed its effective continuation, and the Carter Administration, the first administration headed by a president from the Deep South since before the Civil War. Two Supreme Court decisions in 1976 and 1980 that threatened to sap the Act’s vigor instead stimulated civil rights activists to mount a campaign for amendments that overwhelmed the Reagan Administration and led to the largest increase in minority elected officials since the first years of the post-Civil War Reconstruction. But no sooner had the promise of the Act finally been fulfilled than the Supreme Court—through strained interpretations of the Act’s intentions and, even more ironically, through the use of the Fourteenth and Fifteenth Amendments to hamper, instead of to protect, minority political rights—stripped the Act of much of its power. By 2006, the Act’s iconic status insured its persistence, but the fears of its staunchest proponents and the barely hidden antipathy of many members of the dominant political party prevented amendments that might have increased its chances to pass muster with the Roberts Court. Eight days after President George W. Bush signed the law, Gregory Coleman, a Texas lawyer with strong ties to the Republican Party, filed a serious challenge to the constitutionality of Section 5. The strange career continues.*

*Analyzing the complete history of Section 5 and emphasizing the story’s ironic elements and shifting course yield lessons that may be useful in the continuing struggle to protect the political rights of minorities.*

## I. The Tangled History of the Voting Rights Act

### A. Latest Twists

On July 20, 2006, only one day after the Senate Judiciary Committee reported a bill reauthorizing key provisions of what conservative columnist George Will called “the 20th century’s noblest and most transformative law,”<sup>1</sup> the U.S. Senate briefly debated and unanimously passed the Voting Rights Act Reauthorization and Amendments Act (VRARA).<sup>2</sup> The apparent impetus for the unusual haste<sup>3</sup> by “the world’s greatest deliberative body,”<sup>4</sup> was the fact that President George W. Bush wished to cite the imminent passage of the Act as evidence of racial progress under his Administration in a speech, arranged at the last minute,<sup>5</sup> marking his first appearance as president before a convention of the National Association for the Advancement of Colored People (NAACP).<sup>6</sup>

But the curtailment of even the appearance of deliberation<sup>7</sup> in order to serve the most immediate of political purposes was not the only odd aspect of the 2005–2006 renewal saga. Despite overwhelming support for the Voting Rights Act (VRA) in Congress and civil society—support that made it inevitable that even the Republican-controlled government would extend the life of the provisions at issue,<sup>8</sup> chiefly Sections 5 and 203<sup>9</sup>—proponents of

1. George F. Will, *VRA, All of It, Forever?*, NEWSWEEK, Oct. 10, 2005, at 70, 70. Topping Will, Representative Steve Chabot of Ohio, the Chairman of the House Judiciary Committee’s Subcommittee on the Constitution, which oversaw the House hearings on the Voting Rights Act in 2005, termed the Act “perhaps the most significant piece of legislation ever passed.” Christy Arnold, *Voting Rights Act to Get Review*, CINCINNATI ENQUIRER, Oct. 17, 2005, available at <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20051017/NEWS01/510170354/1077>.

2. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (to be codified at 42 U.S.C. §§ 1971, 1973); S. REP. NO. 109-295, at 54 (2006); Charles Babington, *Voting Rights Act Extension Passes in Senate, 98 to 0*, WASH. POST, July 21, 2006, at A1.

3. In 1965, the Senate passed the VRA forty-six days after the Judiciary Committee reported it. *Voting Rights Act of 1965*, 21 CONG. Q. ALMANAC 533, 544–45 (1965). In 1982, the time between reporting and passage in the Senate was forty-five days. *Voting Rights Act Extended, Strengthened*, 38 CONG. Q. ALMANAC 373, 376 (1982).

4. The phrase is ubiquitous; its origins, murky. See, e.g., DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD 5 (1960) (referring to the U.S. Senate as “the greatest deliberative body in the world”); Burdett A. Loomis, *Civility and Deliberation: A Linked Pair?*, in ESTEEMED COLLEAGUES 1, 1 (Burdett A. Loomis ed., 2000) (referring to the U.S. Senate as the “world’s greatest deliberative body”).

5. Darryl Fears, *President to Address NAACP Tomorrow*, WASH. POST, July 19, 2006, at A5.

6. Dana Milbank, *For Bush and the NAACP, Uneasy Does It*, WASH. POST, July 21, 2006, at A2; Patty Reinert, *Chilly Reception for Bush in First Speech to NAACP*, HOUS. CHRON., July 21, 2006, at A1.

7. In Rick Pildes’s fine phrase, congressional consideration of the VRARA was “a tale of political avoidance.” Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 151 (2007), <http://yalelawjournal.org/images/pdfs/614.pdf>.

8. See generally Jonathan Allen, *In Senate, It’s D’j’ Vu All Over Again on Voting Rights Act Extension*, HILL, June 28, 2006, available at <http://thehill.com/leading-the-news/in-senate-its-dj-vu-all-over-again-on-voting-rights-act-extension-2006-06-28.html> (explaining that Republicans feared

minority voting rights settled for only slight revisions in the law.<sup>10</sup> Deferring entirely to Republican leaders, the overwhelmingly Democratic civil rights forces agreed to sponsor no amendments to the basic legislation encompassing these revisions, and they gave Republicans full credit for passing the Act.<sup>11</sup> Republicans, who controlled both houses of Congress for the first time ever during serious consideration of the VRA and who had displayed nearly unprecedented unity during the first six years of President George W. Bush's term, split almost in half over the bill in the House and secured only one ambiguously written amendment to the VRA that clearly helped their party.<sup>12</sup> Conversely, the often-factionalized Democrats, who claimed the allegiance of the overwhelming number of African-American and Latino voters and who had generally been shut out of influence over legislation during the George W. Bush Administration, managed, through almost complete unity, to avoid changes that would have gutted or repealed Sections 5 and 203, but their only positive accomplishment merely restored Section 5 to its damaged pre-2000 state.<sup>13</sup> While the idealists were too cautious to seek

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opposition would label the party racist); Laurie Kellman, *Parties Unite to Renew Voting Rights Act*, BOSTON GLOBE, May 2, 2006, available at [http://www.boston.com/news/nation/washington/articles/2006/05/02/dems\\_gop\\_stand\\_together\\_on\\_voting\\_rights](http://www.boston.com/news/nation/washington/articles/2006/05/02/dems_gop_stand_together_on_voting_rights) ("Opponents [of the Act are] fighting a losing battle . . ."); Rick Lyman, *Extension of Voting Act Is Likely Despite Criticism*, N.Y. TIMES, March 29, 2006, at A14 (describing the law as in "little danger of expiring"); Abigail Thernstrom & Edward Blum, *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10 (suggesting that congressional Republicans "grovel" on race issues); Edward Blum, *An Insulting Provision*, NAT'L REV. ONLINE, May 2, 2006, [\[http://article.nationalreview.com/?q=NjRmNzIzZmRlZDM2ZWQ5MmEzYmFjNWQ1NTVjNjk0NDU=\]](http://article.nationalreview.com/?q=NjRmNzIzZmRlZDM2ZWQ5MmEzYmFjNWQ1NTVjNjk0NDU=) ("[Republicans are] hell-bent on keeping this system in place.").

9. Section 203, added to the VRA in 1975, requires that jurisdictions with appreciable numbers of citizens who are not literate in English translate all election and ballot materials into the languages of the appropriate groups. Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, sec. 203, § 4(f), 89 Stat. 400, 401–02 (1975) (codified as amended at 42 U.S.C.A. § 1973b (West 2003 & Supp. 2007)).

10. See Posting of David Mikhail to The Hill's Congress Blog, <http://blog.thehill.com> (June 26, 2006) (on file with the Texas Law Review) [hereinafter Mikhail Posting] (noting compromises made by Democrats and civil rights leaders on measures regarding voter protection).

11. See Press Release, ACLU, ACLU Applauds as President Bush Signs Voting Rights Act Reauthorization (July 27, 2006), available at <http://www.aclu.org/votingrights/gen/26259prs20060727.html> (lauding President Bush for signing the VRARA and specifically noting with approval that Congress had "rejected attempts to dilute the original intent of the bill"); NAACP Legal Defense Fund, *Minority Vote Protected for 25 More Years* (July 27, 2006), <http://www.naacpldf.org/content.aspx?article=956> (praising President Bush for signing the VRARA into law).

12. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. § 1973c) (adding to Section 5 of the VRA the requirement that any voting qualification, practice, or other means that "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates . . . denies or abridges the right to vote within the meaning of subsection (a) of this section"); see also James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 222–23, 244–45, 250–51 (2007) (detailing the terms of the bill and describing Republican division).

13. See Tucker, *supra* note 12, at 221–22, 237, 245 (describing Democrats withdrawing divisive amendments and refraining from partisan attacks).

changes in the VRA in an effort to dissuade the Supreme Court from applying its “New Federalism” doctrines<sup>14</sup> to the Act, some Republicans, especially those on the Senate Judiciary Committee, adopted tactics and issued statements and reports that virtually invited the Supreme Court to declare the VRA unconstitutional.<sup>15</sup>

As a result of these and other strange occurrences, a manifestly effective law that rested upon a degree of support for minority political rights unprecedented in the country’s history<sup>16</sup> was simultaneously extended for another twenty-five years and threatened with judicial termination in the near future.<sup>17</sup>

### B. *The Perils of Oversimplified, Partial Histories of Section 5*

This Article argues that the strange and ironic elements of the story of the 2006 VRARA are typical of the history of its most controversial provision, Section 5, and that recounting that history will help us both to understand a crucial civil rights policy and to devise workable solutions to the problems in voting rights that are sure to arise in the future, especially if the Supreme Court declares one or more sections of the VRA unconstitutional. Telling the history of Section 5 in parts, as all past scholarship has, distorts its nature by smoothing out informative kinks, telescoping complex and often paradoxical developments, and misleadingly characterizing motives.<sup>18</sup> It is too easy, as some scholars have, to see the Act’s development as linear and deterministic, without fits and starts, constant struggle, disappointments, as well as triumphs. Thus, one treatment of the 1970–1982 renewals of the VRA, which painted them as rather easy

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14. See *infra* subpart VI(A).

15. See Tucker, *supra* note 12, at 261–67 (describing attempts by Republican senators who voted for the VRARA to undermine the Act); *Georgia Leaders Urge Lawsuits on Voting Rights Act*, AUGUSTA CHRON. (Ga.), Sept. 12, 2006, available at [http://chronicle.augusta.com/stories/091206/met\\_96277.shtml](http://chronicle.augusta.com/stories/091206/met_96277.shtml) (describing efforts by two Republican members of Congress to find a test case with which to challenge the constitutionality of the VRA).

16. No legislative act or major amendments on minority political rights had ever passed a house of Congress unanimously before, and from 1872 until 1957, no such act had passed at all. J. MORGAN KOUSSE, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 39–40 (1999) (detailing the Legislature’s roll-call votes on major issues of civil rights from 1866 to 1982).

17. See Victor Andres Rodríguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 794 (2003) (suggesting the judicial threat).

18. See, e.g., H.R. REP. NO. 109-478, at 6–11 (2006) (telescoping events); BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 30–31 (1992) (same); ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 33–34, 38, 77, 82–84 (1987) (distorting the purpose of the Act); Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in *MINORITY VOTE DILUTION* 167, 167–70 (Chandler Davidson ed., 1984) (smoothing history); Dale Krane, *Implementation of the Voting Rights Act: Enforcement by the Department of Justice*, in *THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 123, 124 (Lorn S. Foster ed., 1985) (presenting a static view of enforcement).

and uneventful, declared that increasing support for the Act “demonstrates the happy logic of democracy.”<sup>19</sup> Another, much more nuanced study still leaned toward inevitability, judging that as early as 1970, “the Voting Rights Act had become a valuable component of the American Creed.”<sup>20</sup> Those civil rights supporters, who fail to realize how precarious the passage and early renewals of the Act were or who, paradoxically, underestimate the extent of the consensus that later supported it, may be too quick to compromise on necessary amendments, as I believe they were in 2006. The dangers and problems currently facing the Act may seem irredeemably complex, even insurmountable,<sup>21</sup> yet the law, which had a long and difficult gestation but a very quick birth induced by the Selma March, has been subject to crises and threats throughout its existence.

Other commentators oversimplify in the service of a political agenda by dividing the Act’s history into a sole initial concern with the individual right to vote and a later bureaucratic or special-interest focus on electoral structures,<sup>22</sup> but that view distorts reality. Still others accept misleading shorthand characterizations of crucial cases interpreting the purposes of the Act.<sup>23</sup> Such characterizations discourage the consideration of amendments to the Act designed to reverse the cases and short renewal periods for the Act that might embolden Congress to clarify misreadings of its goals by the

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19. Colin D. Moore, *Extensions of the Voting Rights Act*, in *THE VOTING RIGHTS ACT: SECURING THE BALLOT* 95, 108 (Richard M. Valelly ed., 2006).

20. STEVEN F. LAWSON, *IN PURSUIT OF POWER: SOUTHERN BLACKS AND ELECTORAL POLITICS, 1965–1982*, at 156 (1985).

21. See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9–10 (2006) (statement of Richard L. Hasen, Professor, Loyola Law School) [hereinafter Hasen Statement] (fearing the Supreme Court would overturn Section 5 if coverage were not updated and more recent southern examples were not cited); Bob Bauer, *The Constitutional Politics of the Voting Rights Act Reauthorization* (May 4, 2006), [http://www.moresoftmoneyhardlaw.com/updates/voting\\_rights\\_act\\_redistricting\\_issues.html?AID=703](http://www.moresoftmoneyhardlaw.com/updates/voting_rights_act_redistricting_issues.html?AID=703) (suggesting that a Supreme Court ruling that the VRA is unconstitutional may force Congress to confront questions it now avoids).

22. See, e.g., TERNSTROM, *supra* note 18, at 11 (“The Voting Rights Act of 1965 had a simple aim: providing ballots for southern blacks. Within five years, . . . complex questions of electoral equality would arise, but certainly at the outset no one envisioned that turn of events.”). By 1968, the attention of voting rights advocates was focused squarely on dilution, not on the right to vote per se. See U.S. COMM’N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* 21–39 (1968) [hereinafter U.S. COMM’N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION*] (discussing dilution as the main impediment to the impact of the black vote). From 1975 to 1980, over 80% of the Justice Department’s objections were to such dilutive laws as at-large elections, majority-vote laws, redistricting, numbered posts, and annexations. U.S. COMM’N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: UNFULFILLED GOALS* 65–70 (1981) [hereinafter U.S. COMM’N ON CIVIL RIGHTS, *UNFULFILLED GOALS*].

23. See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1717–18 (2004) (discussing *Beer v. United States*, 425 U.S. 130 (1976)).

courts more frequently. Still others concentrate entirely on judicial cases<sup>24</sup> or, conversely, on administrative actions,<sup>25</sup> both of which tend to overlook the complicated minuets involving courts, Congress, and bureaucracy. Awareness of these elaborate dances would make activists more anxious to push Congress for explicit amendments in the text of the law, more focused on oversight of bureaucratic procedures, and more skeptical about “bright-line” rules. The forms of voting discrimination may have changed over time, but until recently, at least, the VRA has been flexible enough to counter them. That necessary flexibility is endangered by abstract rules,<sup>26</sup> as well as by judicial and political restrictions on the Act’s scope.<sup>27</sup> In a larger sense, the history of Section 5, reviewed entirely and in detail for the first time here, is only a chapter in America’s strange and ironic history of race relations, one that will be illuminated by applying insights drawn from the work of the dean of the twentieth-century study of the history of race relations, C. Vann Woodward. Incomplete, oversimplified, superficial history provides an inadequate background for making or assessing policy. To control the future, we must begin by understanding the past.

## II. Strange and Ironic: C. Vann Woodward’s View of Race Relations and Southern History

The most widely read book ever written on the history of American race relations, C. Vann Woodward’s *The Strange Career of Jim Crow*, began in research that Woodward, a white southerner, conducted for the NAACP Legal Defense Fund’s brief in *Brown v. Board of Education*.<sup>28</sup> Composed on the cusp of change from the legally segregated to the legally desegregated

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24. See, e.g., KEITH J. BYBEE, *MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION* 7 (1998) (analyzing the theoretical foundations of Supreme Court redistricting decisions and the ideological debates those decisions have produced).

25. See, e.g., HOWARD BALL ET AL., *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT* 8 (1982) (examining the implementation of “radical voting rights policy” by “concentrating on administrative management . . . and focusing on the intergovernmental environment”).

26. In 2006, Congress attempted to overrule *Georgia v. Ashcroft*, 539 U.S. 461 (2003) by stating that unless single minorities comprised half or more of a potential legislative or other district, they did not deserve protection under Section 5. See *infra* notes 554–65 and accompanying text. For a demonstration of the usefulness of the standards of *Georgia v. Ashcroft* in efforts to protect minority voting rights, see Tim Mellett et al., U.S. Dep’t of Justice, Section 5 Recommendation Memorandum 29–73 (Dec. 12, 2003) [hereinafter Section 5 Recommendation Memorandum], available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>.

27. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995) (holding that a redistricting scheme would be subject to strict scrutiny if it assigned any significant number of voters to a district on the basis of race); Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A1 (explaining that the professional staff of the Justice Department found Texas’s 2003 redistricting plan in violation of the VRA because the state did not prove that the plan had no discriminatory effect).

28. 347 U.S. 483 (1954). See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).



South, the short, but influential *Strange Career* was guardedly optimistic about the future of race relations after *Brown*. Woodward's analysis rested on four propositions: first, that institutions, not culture, had shaped southern race relations; second, that slavery and segregation were not equivalent and, more particularly, that segregation had not immediately replaced slavery as a "natural" form of racial control or interaction; third, that the extreme domination of one race over the other was not inevitable—there were forgotten alternatives to segregation and disfranchisement in the post-1877 South; and finally—a proposition so fundamental as to remain unnoticed, perhaps even to Woodward, but which has emerged against the background of recent static cultural treatments of the subject<sup>29</sup>—that race relations, like any other aspect of human relationships, could change and vary. Strict, virtually uniform segregation was, Woodward asserted, the result of state and local laws that regularized and policed previously untidy, frequently mixed, and sometimes nearly egalitarian, if furtive, relations between people of different races. As party competition, especially, Woodward thought, between Populists and Democrats, tended to preserve black rights and status, white Democratic desires to end both partisan opposition and any shreds of racial equality prevailed only through law.<sup>30</sup>

As the Civil Rights Movement intensified and then collapsed in the twenty years after *Brown*, and as national administrations moved from tepid support of black civil rights under Eisenhower, to enthusiastic cooptation under Johnson, to politicized backlash under Nixon, *Strange Career* went through three editions that mirrored the times.<sup>31</sup> Even more than in the first edition, the later versions emphasized that changes might lurch forward or backward and the profound difficulty of sustaining policies that benefitted minorities. At the time of the earlier classic, Gunnar Myrdal's *American Dilemma*, it had seemed to many people of good will that all America needed to do to solve its race problem was for whites to recognize the inconsistency

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29. See generally, e.g., MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998) (discounting white-ethnic-group conflict); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991) (setting forth a static view of working-class racism); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* (1984) (offering a cultural-psychological interpretation); Eric Arneson, *Whiteness and the Historians' Imagination*, 60 INT'L LAB. & WORKING-CLASS HIST. 3 (2001) (assessing "whiteness studies" negatively).

30. See C. VANN WOODWARD, *AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN THE NORTH-SOUTH DIALOGUE* 252–60 (1964) (positing a link between party competition and black rights); WOODWARD, *supra* note 28, at 63, 81–82 (contending that laws regularized inconsistent practices).

31. Woodward's next paragraph after discussing the passage of the VRA in the third revised edition of *Strange Career* begins: "For a very brief interval the optimists had things their way." C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 186 (3d rev. ed. 1974).

between racial discrimination and the egalitarian “American Creed.”<sup>32</sup> By 1974, it was clear to Woodward and nearly everyone else that ideological consistency was at best only a first step. There is an Olympian despair about the third and last revised edition of *Strange Career*, as the decade after the passage of the two major national civil rights laws brought a seeming abandonment on the part of both blacks and whites of the nonviolent methods that inspired the movement for the laws and the integrationist ideals that both the movement and the laws embodied. Victory over segregation was no sooner declared than it was reversed. The federal courts and the Executive Branch—which had forged and wielded the chief tools to attack racial inequality—had, by the time of *Milliken v. Bradley*,<sup>33</sup> apparently become the engines of its reinforcement.<sup>34</sup>

Woodward’s understanding, particularly in later editions of *Strange Career*, that racial discrimination takes many forms, his realistic view of the difficulty of eliminating prejudice and discriminatory behavior, and his perception that racial progress is neither inevitable nor hopeless can help us unravel the complicated history of the VRA. Section 5 of the VRA may be seen as representing the child of light to the segregation laws’ children of darkness<sup>35</sup>—the law that systematized a previously uneven and frustratingly slow assault on racial discrimination in voting and election structures<sup>36</sup> and insured some uniformity in the guarantee to underrepresented ethnic-minority groups of an equal opportunity to participate in elections and to

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32. See 1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 23 (1944) (noting the conflict between the ideals of the “American Creed” and the “status actually awarded” to blacks).

33. 418 U.S. 717 (1974).

34. WOODWARD, *supra* note 30, at 211–12.

35. The reference is to one of Woodward’s favorite authors, Reinhold Niebuhr. See REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE* 9 (1960) (dubbing moral cynics “children of darkness” and “[t]hose who believe that self-interest should be brought under the discipline of a higher law . . . the children of light”); see also, e.g., C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 171, 171–72 (Vintage Books 1961) (1960) (applying Niebuhr’s analysis of the “American pretensions” of “illusions of innocence and virtue” to Woodward’s discussion of the “American legend of success and victory”).

36. Chief Justice Warren wrote in *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (citation omitted):

Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

See also *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong., pt. 1, at 14 (1965) (statement of Nicholas Katzenbach, Att’y Gen. of the United States) (“[E]xisting law is inadequate. Litigation on a case-by-case basis simply cannot do the job.”). The Justice Department’s frustrating experiences in Alabama before the passage of the VRA are detailed in BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007).

elect candidates of their choice. In this sense, Section 5 represents a sort of inverse instance of Woodward's "Jim Crow thesis,"<sup>37</sup> with the implications that if the law is declared unconstitutional by the Supreme Court or strangled by narrow administrative construction, minority voting rights will again vary, perhaps widely, from place to place and from time to time, and that the dwindling party competition in many places in the South will provide, at best, only weak support for minority rights. Woodward's story of segregation and discrimination in the late nineteenth century was one of slow regression and then despair. There are more parallels between race relations in the 1890s and the VRA in the 1990s than many scholars may realize.<sup>38</sup>

There is another facet of Woodward's scholarship, his insatiable taste for irony,<sup>39</sup> that illuminates the history of Section 5. In his still-timely essay *The Irony of Southern History*, Woodward contrasted "the American legend of success and victory,"<sup>40</sup> a legend that has "fostered the tacit conviction that American ideals, values, and principles inevitably prevail in the end," with the white southern experience of defeat and discontinuity, the product of the Civil War and the abolition of a slaveholder-dominated society.<sup>41</sup> Historians bathed in the experience of the South, Woodward hoped, would produce, instead, an American history that would "constitute a warning that an overwhelming conviction in the righteousness of a cause is no guarantee of its ultimate triumph, and that the policy which takes into account the possibility of defeat is more realistic than one that assumes the inevitability of victory."<sup>42</sup> An ironic history of Section 5 may avoid the triumphalist, foreshortened story of irrepressible, almost-unresisted success that pundits and other casual observers often repeat. Treating the story as less than an effortless success is not only more realistic, but it may contribute something to staving off future defeats. In any event, the more complicated history cannot avoid being suffused with a pervasive sense of irony, for the course of Section 5 has been characterized by deep ironies from 1965 on.<sup>43</sup>

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37. See generally WOODWARD, *supra* note 31.

38. On the recent gradual resegregation of schools and predictions of much more to come, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2801–02, 2831–34 (2007) (Breyer, J., dissenting).

39. See J. Morgan Kousser & James M. McPherson, *Introduction* to REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD, at xiii, xx–xxv (J. Morgan Kousser & James M. McPherson eds., 1982) (noting Woodward's use of irony).

40. WOODWARD, *supra* note 35, at 168.

41. *Id.* at 168–69, 168–71.

42. *Id.* at 190.

43. I am not the first to note ironies in the history of the VRA. See, e.g., Days & Guinier, *supra* note 18, at 172 ("Somewhat ironically, however, [the Reagan Administration proposals] provided the ninety-seventh Congress with an opportunity to reconsider the reasons for the act's original passage and to reaffirm the basic goals and objectives."); Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION, *supra* note 18, at 145, 145 ("The two-year-long debate [over the Voting Rights Act amendments of 1982] also produced an

### III. The Institutionalization of a Flexible Provision: From Selma to Mobile, 1965–1980

#### A. *Proxy Disfranchisement and the Evolution of Reform*

Section 5, the most constitutionally radical innovation of the VRA, until 2006 barred certain states and counties from enacting or administering any post-1964 “qualification, prerequisite, standard, practice, or procedure” without a declaratory judgment by the U.S. District Court for the District of Columbia or a similar declaration by the U.S. Attorney General that the law “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”<sup>44</sup> It was the product of experience, not logic or theory.<sup>45</sup> Adopted in 1870, the Fifteenth Amendment provides, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>46</sup> The Reconstruction Congresses interpreted the Amendment very broadly, within a year passing laws to enforce it by protecting voters against violence, intimidation, and bribery from private, as well as official persons; by supervising congressional elections from registration through the counting of ballots; and by giving the president the power to suppress the Ku Klux Klan, and similarly violent organizations, on the factually valid view that Klansmen meant to interfere with blacks’ right to vote.<sup>47</sup> In 1875, Republicans proposed to widen the scope of violent activities against voters punishable by law and to outlaw “excessive poll taxes,” but Democrats filibustered the proposal, as they did a sweeping bill against corruption in elections in 1890, the first time after 1875 that the Republicans held the presidency and majorities in both houses of Congress.<sup>48</sup>

Although Democrats had charged during ratification debates that the Fifteenth Amendment would massively expand the powers of the national government, allowing it to regulate all aspects of local, state, and federal elections,<sup>49</sup> after the Amendment went into effect, Democrats gave it the narrowest possible reading and launched a strategy of imposing discriminatory electoral structures, as well as adopting suffrage qualifications that disfranchised those with personal traits thought to be particularly prevalent among

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ironic by-product—a Supreme Court decision, *Rogers v. Lodge*, which goes far toward undoing the damage done by the earlier Supreme Court case of *Mobile v. Bolden*.” (citations omitted)).

44. 42 U.S.C. § 1973c (2000) (amended 2006). Congress in 2006 very slightly rewrote Section 5 to make it unmistakably clear that objections could be made on *either* purpose or effect grounds. H.R. REP. NO. 109-478, at 65 n.168 (2006).

45. See LANDSBERG, *supra* note 36, at ix (“[T]he record of Department of Justice litigation . . . provided the foundation on which the act was built.”).

46. U.S. CONST. amend. XV, § 1.

47. KOUSSER, *supra* note 16, at 18.

48. *Id.*

49. *Id.*

African-Americans.<sup>50</sup> Southern Democrats gerrymandered election districts, instituted at-large elections, annexed or deannexed land as it fit their racial and partisan interests, and required huge bonds of officeholders.<sup>51</sup> Seizing temporary legislative majorities through violence and ballot-box stuffing, they passed literacy tests or their equivalents, the “eight-box” or secret-ballot laws, which disproportionately disadvantaged ex-slaves, who had been prohibited by law from learning how to read.<sup>52</sup> Democrats also instituted property tests or poll taxes, which especially penalized blacks for their disproportionate poverty.<sup>53</sup> Compounding the inequity of a discriminatory system of criminal justice, they expanded the list of disfranchising crimes to emphasize those for which blacks were particularly likely to be convicted, such as miscegenation and wife beating.<sup>54</sup> Finally, there was the white primary, which did not completely deny African-Americans the right to vote; they just could not vote in the only important elections.<sup>55</sup> Southern strict constructionists contended that none of these laws violated the Fifteenth Amendment because none on their face relied on race as a bar to voting.<sup>56</sup> More practically, the methods testified to the genius of Jim Crow southern politics, which was always to be able to create a new technique to replace one that was not suppressing enough black votes.

After *Smith v. Allwright*<sup>57</sup> outlawed the white primary,<sup>58</sup> when southern blacks threatened to vote in large numbers for the first time since the turn of the twentieth century, white Democrats reverted to such reliable means as racial gerrymandering, at-large elections, and felon disfranchisement, as well as employing variations of other subterfuges, such as the privatized white primary, greatly strengthened literacy tests, and the expansion of the administrative discretion of registration and election officials to enable them to increase informal discrimination that was difficult to document in court. Lawsuits against such tactics by private parties being slow and localized, supporters of equal rights enlisted the help of Republicans and Democrats, who were, at that time, competing for black votes, to pass the 1957 and 1960 Civil Rights Acts. These Acts authorized the Department of Justice to file suits against discriminatory voting practices and established the Civil Rights Commission to study patterns of discrimination in voting and other areas.<sup>59</sup>

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50. *Id.* at 25.

51. *Id.* at 25–34.

52. *Id.* at 34–35.

53. *Id.* at 35.

54. *Id.* at 36–37.

55. *Id.* at 37–38.

56. *Id.* at 38.

57. 321 U.S. 649 (1944).

58. *Id.* at 664–65.

59. See generally STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 140–249 (1976).

Those who framed and debated the original VRA in 1965 were acutely aware of the history of election discrimination.<sup>60</sup> Not only did they entirely outlaw the central techniques of disfranchisement, literacy tests, and poll taxes, but they also attacked administrative discrimination by authorizing federal officials to examine state registration and election records and procedures.

To guard against the century-old southern trick of finding traits that proxied race or electoral structures that especially disadvantaged blacks, the framers introduced one of the most innovative governmental mechanisms since the New Deal—Section 5.<sup>61</sup> Detailing “the variety of means used to bar Negro voting,”<sup>62</sup> including the infamous Tuskegee Gerrymander,<sup>63</sup> the House Judiciary Committee declared that because neither private lawsuits nor those brought by the government under the 1957, 1960, and 1964 laws produced sufficiently rapid results, a new method was needed: “Progress has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process.”<sup>64</sup> The Committee went on to emphasize that “even after apparent defeat[,] resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.”<sup>65</sup>

Properly skeptical of Deep South jurisdictions because of their history of discrimination, Congress combined two important innovations into Section 5. First, legal scrutiny of all election laws in covered jurisdictions was automatic. Civil rights organizations or other private parties did not have to bring expensive, time-consuming lawsuits to challenge laws and administrative procedures in areas whose history made their actions suspect. Second, the burden of proof was shifted to the local and state jurisdictions, which had to prove to the District Court or the Department of Justice that the law had neither the purpose nor the effect of discriminating.

The tactics of those who wished to preserve or restore equal political rights were in a way mirror images of the moves of those who wished to restore or buttress white supremacy. One proliferated discriminatory devices; the other worked and reworked laws in attempts to counter changing southern strategies. Both sides were practical and flexible; neither acted as though

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60. See H.R. REP. NO. 89-439, at 11–12 (1965) (discussing literacy tests beginning with Mississippi’s, adopted in 1890).

61. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C.A. § 1973c (West 2003 & Supp. 2007)).

62. H.R. REP. NO. 89-439, at 8.

63. See *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (recounting the fact that the boundary of the City of Tuskegee was changed from a square shape into a “strangely irregular twenty-eight-sided figure” in order to “remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident”).

64. H.R. REP. NO. 89-439, at 9.

65. *Id.* at 10. See generally LANDSBERG, *supra* note 36, at 34–147 (documenting this process exhaustively in three Alabama counties).

it believed that political equality could be guaranteed by granting blacks merely the right to register and cast ballots. The history of black suffrage before 1965, a history of which policy makers on all sides were unusually aware, was anything but simple.

### B. Centralized Efficiency?

When the final version of the VRA was being hastily drafted after the horses of the Alabama State Troopers in Selma stampeded the Johnson Administration into action, the safely nonsouthern District Court of the District of Columbia was slated to be the principal venue for vetting new southern election laws that might seek to evade the movement toward electoral equality. The Justice Department, which quickly replaced the district court as the site of preclearance because of the apparent administrative efficiency of an executive agency compared to a rule-bound court, was not tasked with preclearance duties in the Administration's original bill and was added to Section 5 as an afterthought.<sup>66</sup> And in some ways, it was a curious afterthought, for although the tiny Civil Rights Division had filed seventy-one voting rights cases from 1957 to 1965,<sup>67</sup> it had less experience investigating voting discrimination than the Civil Rights Commission, an independent agency that had been holding hearings and intensively studying the subject since the Commission's inception in 1957.<sup>68</sup> In the Johnson Administration's first draft of the bill, dated March 1, 1965 (six days before "Bloody Sunday" in Selma), there was no preclearance section, but the Civil Rights Commission had a central role in a quite-analogous process—ruling on whether local jurisdictions could be trusted to administer literacy tests in a nondiscriminatory fashion. This provision and the Civil Rights Commission's participation were dropped from the bill, for unstated reasons, in the draft of the afternoon of March 12, which also added what became Section 5, at first scheduled to be administered largely by the U.S. District Court for the District of Columbia. The bill was introduced on March 15, and in subsequent committee and floor consideration in Congress, the Civil Rights Commission was not given any oversight role.<sup>69</sup> The last-minute shift in the federal-oversight task and in the governmental body overseeing it reveals that the strange birth of Section 5 was far from the simple, logical

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66. John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 124 (1972); *Voting Rights Act of 1965*, *supra* note 3, at 540.

67. H.R. REP. NO. 89-439, at 9.

68. *See generally* U.S. COMM'N ON CIVIL RIGHTS, VOTING IN MISSISSIPPI (1965); U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS '63: 1963 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1963); 5 U.S. COMM'N ON CIVIL RIGHTS, JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT (1961); U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1959 (1959).

69. *See generally* LANDSBERG, *supra* note 36, at 157–61 (describing the sequence of drafts of the bill).

outgrowth of dissatisfaction with the experience of litigation under the 1957 and 1960 Civil Rights Acts, as it is so often made to appear.<sup>70</sup>

If the purpose of providing an alternative to full-blown trials for preclearance was administrative efficiency, why was the duty not given to an administrative agency dedicated to that purpose?<sup>71</sup> After all, independent agencies like the Interstate Commerce Commission, the Food and Drug Administration, the Equal Employment Opportunity Commission, and later, the Federal Election Commission carried out similar quasi-judicial regulatory tasks. But instead of handing the preclearance function to an independent, experienced, bipartisan agency like the Civil Rights Commission, the Administration and Congress, apparently without deep contemplation, tossed the responsibility to a Justice Department that was by no means organized to

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70. See, e.g., THERNSTROM, *supra* note 18, at 15–17 (characterizing the framing of the VRA as the logical and obvious response to the obstacles federal civil rights litigators had faced over the previous decades). Thernstrom's version of the VRA, repeated endlessly, often in very nearly the same words, is of a law that burst, full grown and already perfect, from a collective Jovian head in 1965, only to be disfigured later by mere-mortal interest groups. See, e.g., Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL'Y 41, 42 (2007) ("It is important to understand the perfect design of every component of the 1965 Act."); *id.* at 46 (describing the current version of the VRA as "jerrybuilt, ramshackle, illogical, almost unworkable—and arguably unconstitutional"). In fact, as this Article tries to show, the 1965 VRA was an intermediate step in a long, imperfect, incremental process. No one in 1965 could possibly have predicted just how it would work; how its proponents, opponents, and multifarious bureaucratic, congressional, and, most of all, judicial interpreters would refashion it; and how it would fare after reverses. The VRA in general and Section 5 in particular have from the beginning been perhaps the prime example in modern American government of the art of muddling through.

71. To be sure, the Civil Rights Commission in 1965 was a tiny, eight-year-old agency without the political and institutional power of the Justice Department, and it was perhaps more easily subject to political pressure than the Department was. Yet, as often noted, the Justice Department did not send federal examiners to recalcitrant Sunflower County, Mississippi, the home of Senate Judiciary Committee Chairman James Eastland, and it minimized the number sent to the State of Georgia, home of the Senate's most powerful southern Democrat, Richard Russell. LAWSON, *supra* note 20, at 101, 184. Later, particularly during the 1990s, the Department's by-that-time-experienced, very professional staff was less subject to political pressures. See Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 120, 178 (2006) ("In the middle to late 1980s and in the 1990s, the legal bases on which the Department could invalidate a non-retrogressive change became, at least temporarily, well set, and the Department then stringently applied the established legal standards in reviewing the facts of individual submissions."). Nonetheless, during the Bush Administration, political appointees repeatedly reversed decisions of the staff of the Voting Section of the Civil Rights Division and drove out many of the most experienced attorneys. *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 117–18 (2007) (statement of Joseph D. Rich, former Chief, Voting Section of the Civil Rights Division, Department of Justice); see MARK A. POSNER, *THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO?* 13–15 (2006), available at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf> (describing the history of politicization of the Justice Department under the Bush Administration). In the early years of the Act's history, the Civil Rights Commission might have withstood pressure about as well as the Justice Department did at that time.



pursue it.<sup>72</sup> The Civil Rights Division was organized regionally, and before 1969 no attorneys were permanently assigned to oversee voting.<sup>73</sup> Moreover, Congress did not give the Justice Department regulatory powers similar to those of established independent agencies or even the weak Equal Employment Opportunity Commission. The Department issued “guidelines,” not “regulations” or “rules” on Section 5, and its objection letters did not have precedential force, as the rulings of many other quasi-executive agencies did.<sup>74</sup>

Although the Civil Rights Commission did not carry out the task itself, it quickly produced a critical examination of the Justice Department’s stewardship in 1965 and, in 1968, 1975, and 1981, the most far-reaching and profound studies of southern electoral practices ever published by a federal agency—studies that were cited as authoritative again and again in judicial opinions and Justice Department documents.<sup>75</sup> One of the forgotten, perhaps unconsidered, alternatives of the VRA was to give the job of preclearance to the agency that was most dedicated to the purposes of the Act, most closely connected to the Civil Rights Movement that forced passage of the Act, and most attuned to the larger patterns of discrimination in American society. And in view of the difficulty of equalizing political opportunity that had been unequal for more than half a century, the tools provided to the Justice Department seemed shockingly weak. The radical provision was not so radical, after all.

In its first major Supreme Court test, *South Carolina v. Katzenbach*,<sup>76</sup> Section 5 was depicted by the southern states that challenged the law as a wholesale bureaucratic intrusion by an all-powerful federal government on its federalist subordinates, the state and local governments.<sup>77</sup> According to the one dissenter in the case, Justice Hugo Black, Section 5 forced the states to come on bended knee to “plead,”<sup>78</sup> “beg,” and “entreat” with the Attorney General or the district court in Washington, “hundreds of miles away” from

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72. The most egregious administrative anomaly in the 1965 VRA was turning to the Civil Service Commission to supply examiners. In his version of the VRA, liberal Republican Congressman John V. Lindsay proposed setting up an independent administrative agency to write rules and oversee the examiners. See H.R. REP. NO. 89-439, at 62–63 (detailing Lindsay’s objections to what he saw as the shortcomings of the Act). Such an agency might eventually have acquired other functions, such as handling preclearance.

73. BALL ET AL., *supra* note 25, at 68–69.

74. See *infra* notes 105–13 and accompanying text.

75. See LAWSON, *supra* note 20, at 30–31 (describing the 1965 study and the Justice Department response). The studies are published in book format. See generally U.S. COMM’N ON CIVIL RIGHTS, UNFULFILLED GOALS, *supra* note 22; U.S. COMM’N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975) [hereinafter U.S. COMM’N ON CIVIL RIGHTS, TEN YEARS AFTER]; U.S. COMM’N ON CIVIL RIGHTS, POLITICAL PARTICIPATION, *supra* note 22; U.S. COMM’N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: THE FIRST MONTHS (1965).

76. 383 U.S. 301 (1966).

77. BALL ET AL., *supra* note 25, at 52–53.

78. *Katzenbach*, 383 U.S. at 360 (Black, J., concurring and dissenting).

their homes, before they could put any change in their own election laws into effect.<sup>79</sup> In an unmistakable reference to the warped reflection of the First Reconstruction that Black must have been exposed to as a boy in Alabama, the Justice declared that Section 5 treated the covered jurisdictions as “conquered provinces.”<sup>80</sup>

The reality was completely different. From 1965 through 1970, the Justice Department did not draft a single guideline on Section 5, it generally assigned only one lawyer to monitoring compliance with the provision, and states and localities, either purposefully or out of ignorance, rarely informed Washington of any election law alterations at all.<sup>81</sup> The covered states made only 325 submissions to the Department of Justice from 1965 through June 30, 1969, 90% of which came from a single state, South Carolina.<sup>82</sup> Through the end of 1969, the Department objected to only 20 of 417 submissions<sup>83</sup>—a small number, hardly a federal takeover of election authority. There were no criminal or civil sanctions for noncompliance with Section 5 nor were there any grants or other incentives for jurisdictions that did submit changes. Compared to most regulatory schemes, Section 5 was toothless.<sup>84</sup> The burden of proof did not shift; compliance was not attained; the law during its first temporary period was an empty stage set waiting for the script to be written.

Far from moving forcefully to insure that states and localities demonstrate that they were not trying to undercut federal supervision of voter registration and the suspension of literacy tests by enacting new laws, the Johnson Administration largely left voter registration, as well as lawsuits, to civil rights organizations. Federal examiners, only 3% of whom were black, registered only about a third of the new black voters in the first three months of the VRA’s existence; over the first two years, they registered only about one in ten.<sup>85</sup> That the Administration that deserves, and has been granted,

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79. *Id.* at 359, 359–60.

80. *Id.* at 360. In his dissent in *Allen v. Board of Elections*, 393 U.S. 544, 595 (1969) (Black, J., dissenting), Justice Black expanded on his reference to the First Reconstruction.

81. BALL ET AL., *supra* note 25, at 65.

82. WASH. RESEARCH PROJECT, *THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH* 139 (1972) [hereinafter WASH. RESEARCH PROJECT, *SHAMEFUL BLIGHT*].

83. Roman, *supra* note 66, at 126 n.54.

84. Richard Scher & James Button, *Voting Rights Act: Implementation and Impact*, in *IMPLEMENTATION OF CIVIL RIGHTS POLICY* 20, 36 (Charles S. Bullock III & Charles M. Lamb eds., 1984).

85. BALL ET AL., *supra* note 25, at 56 (citing 1965–1967 statistics for counties that were visited by federal examiners); DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 183–84 (1978) (citing 1965 statistics measuring the number and pace of black-voter registration); *see also* L. Thorne McCarty & Russell B. Stevenson, Note, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. C.R.-C.L. L. REV. 357, 372–78 (1968) (noting that after an initial burst of registration of black voters in 1965, the rate of registration dropped sharply and that the Justice Department was deliberately dilatory in sending registrars to the Deep South, especially to rural areas). No doubt federal examiners deterred continued

abundant praise for passing the most far-reaching advance in minority voting rights since the Fifteenth Amendment did so little to implement the law that civil rights leaders in November 1965 charged it with “administrative repeal” of the VRA is deeply puzzling.<sup>86</sup> That private parties, which were not explicitly part of the scheme of federal judicial and administrative protection under the VRA at all, should have been the first to sue to determine the scope of Section 5’s coverage was simply the active complement of the Johnson Administration’s passivity.

### C. *Extension in Scope and Time*

To counteract the effect of the surge in black voter registration in 1965 and 1966, Mississippi had passed a phalanx of laws changing elective to appointive offices—moving from single-member districts to at-large elections, combining predominantly black with predominantly white counties to submerge the blacks in majority-white districts, and so on.<sup>87</sup> In *Allen v. Board of Elections*,<sup>88</sup> the U.S. Supreme Court first granted plaintiffs represented by the Lawyers’ Committee for Civil Rights and the Lawyers’ Constitutional Defense Committee standing to sue to require that Mississippi submit laws changing election structures to the Department of Justice or the District of Columbia District Court under Section 5 and then ruled that the legislative history as a whole indicated that Congress intended such laws to come within Section 5’s purview.<sup>89</sup> Yet paradoxically, Chief Justice Earl Warren refused to overturn the elections that had already been held under the nonprecleared Mississippi laws,<sup>90</sup> effectively allowing the deepest of Deep South states to enact and put into force new election laws without Washington’s approval, against the manifest purpose of Section 5. As Justice John Marshall Harlan pointed out, if Section 5 expired in 1970, as originally scheduled, no official in any covered jurisdiction would have been removed from office even if the law under which he was elected or appointed had been enacted after 1964 and had a racially discriminatory purpose or effect but had never been

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discrimination by registrars in counties to which they were sent, but civil rights leaders, including the Civil Rights Commission, were harshly critical of the Justice Department’s unwillingness to authorize examiners for many more counties in which private registration drives continued to encounter resistance. LAWSON, *supra* note 20, at 24–29.

86. See JAMES C. HARVEY, *BLACK CIVIL RIGHTS DURING THE JOHNSON ADMINISTRATION* 159 (1973) (noting the criticisms of civil rights leaders).

87. FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965*, at 34–77 (1990).

88. 393 U.S. 544 (1969).

89. See *id.* at 554–57, 563–71; see also John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U. L. REV. 107, 110–11 (1979) (discussing *Allen* and its consequences). Presumably because it came first alphabetically, the case is known by the name of a Virginia lawsuit concerning a bulletin about aiding illiterate voters, an easier issue for the Court to decide, rather than by the names of the three much more significant Mississippi cases.

90. *Allen*, 393 U.S. at 571–72.

submitted for preclearance.<sup>91</sup> Thus, the same decision that in its substantive phase recognized the broadest scope for the VRA treated Section 5 as non-existent during its penalty phase.<sup>92</sup> No branch of government had a monopoly on contradictions.

In the same month that *Allen* was handed down, South Carolina Republican Chairman Harry Dent, the key operative in Nixon's "southern strategy," told a meeting of southern GOP state chairmen that "the Voting Rights Act looks like it's coming along pretty good so that the monkey will be off the backs of the South."<sup>93</sup> Indeed, after rejecting internal administration pressures for a straight renewal of those provisions of the VRA that expired in 1970, Attorney General John Mitchell proposed deleting Section 5 altogether, returning to the case-by-case quagmire in southern federal courts, on the curious grounds that the Department that he headed had never enforced it, anyway.<sup>94</sup> After Rules Committee Chairman William Colmer of Mississippi delayed the bill for four months, the House startled liberals by substituting the Administration's bill for the House Judiciary Committee's simple five-year extension of the VRA by a vote of 208–203.<sup>95</sup> Responding to Administration appeals and pressures, Republicans voted 129–49 against preclearance, joining 69 of 83 southern Democrats, but only 10 of 151 northern Democrats.<sup>96</sup> This Republican shift from the party's Lincolnian heritage, according to African-American Democratic Congressman John Conyers, represented "an approach toward Republicanizing the South."<sup>97</sup>

This was just the stimulus that what was left of the civil rights movement needed. Opposition to key provisions of the VRA by the Nixon Administration, as in 1982 by the Reagan Administration, served to focus and enliven proponents and to resurrect seemingly moribund Republican Party civil rights fervor. In the Senate, there was a backlash against the backlash, and liberals sidestepped the hostile Judiciary Committee, marshaled lobbyists, avoided a long filibuster, and renewed Section 5 for

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91. *Id.* at 593–94, 593 & n.12 (Harlan, J., concurring in part and dissenting in part).

92. *See* Roman, *supra* note 66, at 119 (noting that *Allen* robbed the successful plaintiffs of a remedy that would have ended the discriminatory practices at issue).

93. LEON E. PANETTA & PETER GALL, *BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT* 106 (1971).

94. GARROW, *supra* note 85, at 194–96; LAWSON, *supra* note 20, at 141. Under the provisions of the 1957 Civil Rights Act, the Justice Department had brought only four cases from 1957 to 1960, and these cases did not result in the registration of a single black voter who was not previously registered to vote. GARROW, *supra* note 85, at 12–14.

95. *Congress Delays Extension of Voting Rights Act*, 25 CONG. Q. ALMANAC 421, 426 (1969); *see* LAWSON, *supra* note 20, at 141 (recounting Colmer's stalling tactics); *see also* PANETTA & GALL, *supra* note 93, at 201–02 (recounting Nixon Administration strategy during the VRA-extension debate).

96. *House Passes Administration Voting Rights Bill*, 234–179; *Votes Extension for Office of Economic Opportunity*, 25 CONG. Q. ALMANAC 74-H, 74-H to 75-H (1969).

97. *Congress Delays Extension of Voting Rights Act*, *supra* note 95, at 422; *see also* LAWSON, *supra* note 20, at 144–45 (recounting Nixon Administration pressure on Congress to accept the Administration's VRA amendment).

another five years by a 64–12 vote.<sup>98</sup> Along the way, the Senate rejected, by a vote of 27–48, an amendment gutting Section 5 by requiring the Attorney General, if he disapproved of an election law submitted to him, to seek an injunction against the law, effectively shifting the burden of proof from the local jurisdiction to the national government, which would have to prove in court that the law had a discriminatory purpose and effect.<sup>99</sup> Despite Administration efforts, which corralled as many as 183 votes on procedural issues, the House then agreed to the rejuvenated VRA by a 272–132 bipartisan margin,<sup>100</sup> and President Nixon disappointed his Dixie minions by signing the bill, decrying only an amendment to it that attempted to enfranchise eighteen-year-olds by statute, instead of by a constitutional amendment.<sup>101</sup> Key moves in the legislative chess game were the sponsorship of the renewed bill by Senate Minority Leader Hugh Scott, a Pennsylvania Republican, and the insistence of Majority Leader Mike Mansfield that action on the VRA had to precede the vote on conservative southern Supreme Court nominee Harold Carswell, a nomination that the Nixon Administration vainly tried to rush through the Senate. Mansfield's agenda manipulation prevented a filibuster, and the entangling of two prominent elements of the Nixonian southern strategy helped to insure the defeat of both.<sup>102</sup>

Perhaps it was a combination of Administration hubris and southern Democratic devotion to principle that inhibited any member of the House or Senate from offering an amendment in 1969–1970 to overturn the *Allen* decision, thereby removing annexation, at-large elections, and redistricting from the class of laws that required preclearance. After the House's initial vote, and with the Senate Judiciary Committee securely in the control of Mississippi Senator James Eastland and other conservatives, a clean and complete repeal of the almost unused, but still possibly potent, restriction on the southern freedom to discriminate may have seemed within reach. It is often remarked that in legislative activity, the best is the enemy of the good—that is, that seeking a perfect policy inhibits the adoption of an

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98. *Congress Lowers Voting Age, Extends Voting Rights Act*, 26 CONG. Q. ALMANAC 192, 194–98 (1970).

99. *Id.* at 198; *Senate Rejects Move to Table Compromise Amendment; Turns Down Other Changes*, 26 CONG. Q. ALMANAC 15-S, 15-S (1970).

100. *Congress Lowers Voting Age, Extends Voting Rights Act*, *supra* note 98, at 198.

101. The Supreme Court accepted Nixon's argument about the eighteen-year-old vote in state and local, but not federal, elections in *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970) (Black, J., announcing the judgments of the Court and expressing his own view of the cases). Significantly, Justice Black, in the lead opinion in a fractured case decided by five votes to four, rested his decision upholding congressional power to enfranchise eighteen-year-olds in federal elections through an amendment of the VRA on Article I, Section Four of the Constitution, suggesting that the Fifteenth Amendment was not the only constitutional basis for the VRA. *See id.* at 119–24.

102. *See generally* GARROW, *supra* note 85, at 196–97 (outlining procedural tactics employed by congressional leadership); *Congress Lowers Voting Age, Extends Voting Rights Act*, *supra* note 98, at 192–95 (summarizing the procedural history of the measure).

improvement. In this instance, it might be said that the worst was the enemy of the merely bad. Hoping to repeal Section 5 altogether, opponents passed up an opportunity to hobble it. As for principle, the white southern arguments against Section 5 from the beginning had been that it was an antisouthern infringement on states' rights.<sup>103</sup> How could one consistently argue that it was constitutional, or even proper, to constrain a state's power to define its electors but not its electoral structure? Whatever the reason, the failure of opponents of Section 5 to constrain it severely when they had their best chance to do so and before its real power had begun to be wielded demonstrates again that the course of the VRA was contingent, not predetermined.

It is also possible that the Nixon Administration gave way because it knew that even if civil rights forces had the power to write the laws, only it had the authority to administer them.<sup>104</sup> Only pressure from civil rights forces in Congress forced the Justice Department to draw up guidelines in early 1971, and the manner in which it administered Section 5 differed from congressional and judicial interpretations of the Act in three major ways. First, its initial draft of the guidelines reversed the burden of proof by providing that the Attorney General would object to a submitted law or regulation only if he affirmatively determined that the law would have a discriminatory effect and that it had a discriminatory purpose.<sup>105</sup> Pressure from the Civil Rights Commission and members of Congress—especially Senators Phil Hart, Jacob Javits, and Hugh Scott, the latter two prominent Republicans, and California Democrat Don Edwards's Civil Rights Oversight Committee of the House Judiciary Committee—forced a reversal, so that the final guidelines, in Section 51.19, required the Attorney General to object even if the evidence of discrimination was indeterminate.<sup>106</sup> That is, the state or local jurisdiction had to prove a negative—that there was *no* racially discriminatory purpose or effect. Changes in the guidelines notwithstanding, the Justice Department continued to preclear laws, such as one in Canton, Mississippi, unless it was convinced by positive evidence that they were racially oriented.<sup>107</sup>

Although Congress provided no explicit directive, a second facet of the guidelines was also disappointing to proponents of minority rights. As Representative Edwards's subcommittee noted, the guidelines made no attempt to insure that states and localities submit all changes, leaving "the burden on the people Congress sought to protect rather than on the covered

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103. LAWSON, *supra* note 59, at 319–20.

104. Republicans on the House Judiciary Committee in 1965 had stressed the partisan danger of assigning preclearance to the Department of Justice. H.R. REP. NO. 89-439, at 46 (1965). The Mitchell Justice Department realized those fears.

105. WASH. RESEARCH PROJECT, SHAMEFUL BLIGHT, *supra* note 82, at 164.

106. LAWSON, *supra* note 20, at 168–73.

107. *Id.* at 171–73.

jurisdictions.”<sup>108</sup> Not only was initial compliance voluntary but so was compliance with Justice Department decisions. Because the Voting Section never had more than thirty employees to deal with thousands of Section 5 submissions, it rarely checked to make sure that jurisdictions did not put into effect laws and regulations that the Department had rejected.<sup>109</sup>

Third, the Administration left vague exactly what constituted a discriminatory purpose or effect, and its criteria varied in practice. To the exasperation of Representative Edwards’s oversight subcommittee, for instance, the Department of Justice precleared Mississippi laws requiring every voter to reregister to vote in twenty-four of twenty-six counties because it chose not to anticipate discrimination in the administration of the laws.<sup>110</sup> This effectively shifted the burden of proof from the counties to the federal government.<sup>111</sup> In South Carolina in March and April, 1972, the Department precleared a state house plan with multimember districts and full-slate and majority-vote requirements on the grounds that those otherwise objectionable provisions predated the most recent reapportionment, but it objected to multimember districts, a majority-vote requirement, and numbered posts for the state senate because the numbered-posts provision was new.<sup>112</sup> In other states, the Department, deferring to contradictory federal district court decisions, shifted its standards as often as a new decision was issued.<sup>113</sup> Covered jurisdictions were probably as confused as the Department seemed to be. Having won in the courts and in Congress, civil rights forces suffered unadvertised reversals at the hands of a faceless bureaucracy.

*D. From Indianapolis to New Orleans, via Dallas and San Antonio, with a Retrogression to Cincinnati*

The year 1971 brought not only the Section 5 guidelines but also the first full redistricting cycle held since the VRA passed, and Section 5 played an important role, being invoked most prominently to overturn a racial gerrymander in Atlanta that was aimed at preventing the election of the first

108. GARROW, *supra* note 85, at 199.

109. See BALL ET AL., *supra* note 25, at 140–43 (noting that through the mid-1980s, the litigation unit of the Voting Section consisted of thirteen attorneys and that the Section was often unaware of what jurisdictions actually put into practice after a rejection).

110. See WASH. RESEARCH PROJECT, SHAMEFUL BLIGHT, *supra* note 82, at 30–45 (summarizing the Subcommittee’s report on the Justice Department’s approach to reregistration and cataloguing Mississippi counties that sought reregistration approval).

111. H.R. REP. NO. 94-196, at 60 (1975); WASH. RESEARCH PROJECT, SHAMEFUL BLIGHT, *supra* note 82, at 24–27, 30–47; U.S. COMM’N ON CIVIL RIGHTS, TEN YEARS AFTER, *supra* note 75, at 94–95.

112. U.S. COMM’N ON CIVIL RIGHTS, TEN YEARS AFTER, *supra* note 75, at 214–19.

113. Stanley A. Halpin, Jr. & Richard L. Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act*, 22 J. PUB. L. 37, 49–58, 62–63 (1973).

black member of Congress from the South in the twentieth century.<sup>114</sup> Quite rapidly, the VRA became more associated in congressional and academic discussions with redistricting than with any other type of electoral law.<sup>115</sup> James Blacksher and Larry Menefee have noted the perverse timing in the fact that the “reapportionment revolution” began just before the VRA created large numbers of black voters in the Deep South for the first time since the First Reconstruction.<sup>116</sup> Had legislative districts in Alabama remained skewed heavily in favor of the Black Belt counties, as they had been between 1901 and the 1964 Supreme Court decision in *Reynolds v. Sims*,<sup>117</sup> Blacksher and Menefee pointed out, African-Americans elected to the legislature would have enjoyed substantially more power after 1965 than they did in an equally apportioned legislature.<sup>118</sup> Yet the conjunction of the reapportionment revolution with Section 5 was more fortunate than Blacksher and Menefee contend. For *Baker v. Carr*<sup>119</sup> and subsequent decisions forced the southern states to redistrict at least once every ten years.<sup>120</sup> Had there been no *Baker*, southern states could have avoided dislodging incumbents or recognizing the increasingly urbanized black population, and the marked jump in southern black state and national legislators that took place after the redistrictings of 1971, 1981, and 1991<sup>121</sup> would not have occurred. Thus, litigation by white suburbanites in Memphis, Nashville, Birmingham, and Mobile ended up benefitting not only themselves but also African-American city dwellers.

The first important redistricting case the Supreme Court decided that involved Section 5 seemed to undercut the removal of political discrimination cases from down-home judges. A three-judge district court ruled Mississippi’s state legislative apportionment unconstitutional due to population inequality, not racial inequality, and rejected plans for single-member districts throughout the state in favor of a plan that used multimember districts in four counties.<sup>122</sup> The Supreme Court, in an anomalous per curiam decision with three dissenters—Why was it not simply a 6–3

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114. LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 149–50 (2003).

115. H.R. REP. NO. 94-196, at 9–11.

116. James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 *HASTINGS L.J.* 1, 39 (1982).

117. 377 U.S. 533 (1964).

118. Blacksher & Menefee, *supra* note 116, at 39.

119. 369 U.S. 186 (1962).

120. *Wesberry v. Sanders*, 376 U.S. 1, 7–8, 17–18 (1964), *Hadley v. Junior College District*, 397 U.S. 50, 52–54 (1970), and similar cases applied population-equality requirements to local, state, and national election districts. Because Article I, Section Two of the United States Constitution requires an enumeration of population once every ten years, redistricting every ten years has become effectively a constitutional requirement.

121. KOUSSER, *supra* note 16, at 19.

122. *Connor v. Johnson*, 402 U.S. 690, 690–91 (1971) (per curiam); Halpin & Engstrom, *supra* note 113, at 51.



decision?—ordered the lower court to draw or choose a single-member-district plan for the state’s largest county.<sup>123</sup> But it also declared, without citations to the text of the law or hearings or reports of Congress on the VRA, and without any reasoning whatsoever, that a redistricting plan adopted by a district court was exempt from Section 5.<sup>124</sup> This suggested that the state or locality could simply propose a plan to a local federal district court, have the court adopt it as its own in some litigation, and expect exemption from Section 5. But in a series of cases, the Court drew a slightly different, though faint, line: What distinguished a court-drawn from a legislative plan was not who proposed it but whose authority put it into force. If a court ruled a legislative plan illegal on any grounds, such as population inequality, then it could adopt parts of that plan without submitting the whole plan to the Justice Department, even if it contained provisions to which the Department usually objected.<sup>125</sup> In any event, as the Republican domination of the presidency after 1968 led to more conservative Republican judges everywhere, often replacing segregation-era southern Democrats, the ideological distance between the District of Columbia District Court and the southern circuits diminished, and it made less and less difference where a voting rights case was litigated.<sup>126</sup> The South rose again to the Mason–Dixon Line.

The Supreme Court also decided two major constitutional redistricting cases, both with opinions by Justice Byron White, that would shadow the interpretation of the VRA for the rest of the century. In *Whitcomb v. Chavis*,<sup>127</sup> Justice White held that an at-large legislative district in Marion County, Indiana (Indianapolis), was constitutional, even though many fewer African-Americans were elected under it than would have been under single-member districts, because the reason the blacks lost was partisan, not racial.<sup>128</sup> Except in landslide years, all Democrats lost, not just black Democrats.<sup>129</sup> But in *White v. Regester*,<sup>130</sup> Justice White ruled that a host of factors—such as a long history of discrimination in Texas and the lingering effects of that legacy, the importance of slating groups on election outcomes, and the prevalence of racial bloc voting—enhanced the effect of at-large

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123. *Connor*, 402 U.S. at 692.

124. *Id.* at 691; Halpin & Engstrom, *supra* note 113, at 52.

125. See MacCoon, *supra* note 89, at 116–17.

126. See, e.g., C.K. Rowland & Robert A. Carp, *A Longitudinal Study of Party Effects on Federal District Court Policy Propensities*, 24 AM. J. POL. SCI. 291, 298, 298–301 (1980) (noting that “President Nixon diligently pursued his campaign promise to appoint conservatives to the federal courts whenever possible” and that these appointments were part of the reason that conservative judicial decisions were issued after 1968).

127. 403 U.S. 124 (1971).

128. *Id.* at 149–53.

129. *Id.* at 150–55.

130. 412 U.S. 755 (1973).

districts in Dallas and San Antonio, rendering them unconstitutional.<sup>131</sup> In both *Whitcomb* and *Regester*, Justice White rejected the view that a mere failure to elect black or Latino candidates in proportion to their percentage of the population was sufficient evidence of a discriminatory effect to violate the Constitution. Although less-than-proportional representation was suggestive, it was merely one among a variety of circumstances to be considered together, systematically, by judges assessing liability.<sup>132</sup> Thus, the Fourteenth Amendment, passed in 1868 to promote equality for African-Americans, was held to guarantee strict mathematical equality of representation to suburbanites and city dwellers in the reapportionment cases, but only a much less mechanical, more complicated formula for equality in the minority-voting-rights cases.

Yet even this diluted test quickly became too pro-minority for the majority of the Supreme Court. When Circuit Court Judge Spottswood W. Robinson, III, a former attorney for the NAACP, sought to apply the *Regester* test to a Section 5 case from New Orleans, the Supreme Court overturned him, 5–3, with Justice White joining Justices Thurgood Marshall and William J. Brennan, Jr. in dissent.<sup>133</sup> Although 45% of the city's population and 34.5% of its registered voters in 1970 were African-American, no black had been elected to the New Orleans City Council in the twentieth century.<sup>134</sup> The reasons for recent black failure were largely structural. In addition to two at-large seats, where the overall white majority always prevailed, there were five single-member districts drawn north–south, joining the affluent white areas in the northern and southern parts of the city but splintering the more heavily black neighborhoods in the center, which ran east–west.<sup>135</sup> Expressly to protect the white incumbents, the city first drafted a plan with no black-registration-majority city-council district and then redrew it to contain one bare black-registration-majority district. The council did not revise its plan out of a desire to enhance minority influence but in order to allay dissatisfaction over the division of the locally chauvinistic Algiers community, which was separated from the rest of the city by the Mississippi River, into three councilmanic districts.<sup>136</sup> The city fathers did try to make way for black representation without displacing whites by

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131. *Id.* at 765–69. Slating groups endorse and publicize a group of candidates, asking voters to cast ballots for all of them. Racial bloc voting occurs when majorities, often very large majorities, of different ethnic groups support different candidates. In at-large elections, a whole community votes for all candidates, rather than splitting the community into two or more districts. It disadvantages minorities, who might be able to win in smaller districts but who could not defeat a united majority in the larger community.

132. *Whitcomb*, 403 U.S. at 157–60; *Regester*, 412 U.S. at 765–66.

133. *Beer v. United States*, 425 U.S. 130, 131, 138–43 (1976). Newly appointed Justice John Paul Stevens, who replaced Justice William O. Douglas after the oral argument had taken place in the Supreme Court, took no part in *Beer*. *Id.* at 131.

134. U.S. COMM'N ON CIVIL RIGHTS, TEN YEARS AFTER, *supra* note 75, at 288.

135. *Id.* at 287–92.

136. *Id.* at 288, 289 n.146.

authorizing referenda to expand the council to nine or eleven members, but white voters overcame a black majority for expansion.<sup>137</sup> The Justice Department objected to both seven-member plans, which differed in their treatment of predominantly black neighborhoods only very slightly.<sup>138</sup> All of the city councilmen save the one from the majority-black district appealed to the District Court for the District of Columbia.<sup>139</sup>

Judge Robinson's comprehensive opinion, joined by the other two judges on the panel, employed the totality-of-circumstances analysis of *Regester*, but it emphasized more than Justice White had the gap between the African-American percentage of voters (35%) and the proportion of seats that blacks might win (14%).<sup>140</sup> More in the style of constitutional than of statutory construction, Judge Robinson termed the right to vote fundamental, requiring New Orleans to demonstrate not just a rational basis but a compelling state interest to justify diluting black votes.<sup>141</sup> Majority-vote and "anti-single-shot" laws, a history and legacy of past discrimination, all-powerful slating groups, and racial bloc voting combined with the way district boundaries had been drawn, Robinson declared, to perpetuate black underrepresentation in political office.<sup>142</sup> Because the effect of the lines was so clear, Robinson felt it unnecessary to rule on the city council's intent.<sup>143</sup>

When New Orleans appealed, the Supreme Court could have affirmed on the basis of *Regester*, ruling that the language and purpose of Section 5 so closely tracked the Fifteenth Amendment that it was surely meant to ban legal changes that violated the Constitution and that the sort of evidence that convinced a unanimous court in *Regester* should be sufficient for the Court three years later. Instead, Justice Potter Stewart and the four Justices appointed by President Nixon ignored Robinson's elaborate totality-of-circumstances analysis and all of the evidence except the percentages of the black population and registered voters in the city-council districts.<sup>144</sup> Why? For their part, the Nixon appointees seem to have been particularly antipathetic to anything that smacked of "quotas," although interestingly enough, their patron had instituted the first programs for minority group quotas in the

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137. *Id.* at 289 n.146.

138. *Id.* at 289–90.

139. *Beer v. United States*, 374 F. Supp. 363, 367 (D.D.C. 1974), *vacated*, 425 U.S. 130 (1976).

140. *Id.* at 384, 388–90.

141. *Id.* at 391–92.

142. *Id.* at 401–02. Majority-vote requirements deny victory to candidates who obtain pluralities, requiring runoff elections if no candidate gains a majority in the first round. Minorities have no chance to elect any candidates against solid majorities. In multicandidate races, it may be possible for the minority to win by casting ballots for one or two co-ethnics. Anti-single-shot laws prevent such tactics.

143. *Id.* at 367.

144. *See Beer*, 425 U.S. at 134–36 (spotlighting percentages of the black population and black registered voters).

federal government.<sup>145</sup> But what explains the position of the “moderate” Justice Stewart? Potter Stewart had served on the city council of Cincinnati from 1949 to 1953, elected under a “single transferable vote” (STV) proportional-representation system, and his father had been the city’s mayor from 1938 to 1947. For thirty years, stalwart Republicans like the Stewarts bitterly fought against the STV system, launching four initiatives against it that barely lost before finally overturning the system in 1957 when it appeared that the city might elect as the most senior city councilman, and therefore mayor, its first African-American chief officer, Theodore Berry.<sup>146</sup> Stewart’s strong aversion to proportional representation, almost certainly the product of his personal experience, largely shaped the second wave of voting rights law that followed the initial *Katzenbach* and *Allen* decisions.<sup>147</sup> Thus, the shining example of proportional representation in American history most likely led to the personal backlash of a man with the power to make “proportional representation” an unanswerable reproach, a byword that would force proponents of such systems to invent new terms, such as “instant runoff voting,” for what they advocate.<sup>148</sup>

Stewart and the other four Justices rejected using proportionality as a benchmark in Section 5 cases, a benchmark that had pervaded Judge Robinson’s opinion. Accepting the position of New Orleans in its brief and citing as his sole evidence of congressional intent a lonely sentence fragment from the 1975 House Report on the VRA, Stewart asserted in *Beer v. United States*<sup>149</sup> that the proper standard against which to measure discriminatory effect under Section 5 was that the change in the covered jurisdiction’s election law “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>150</sup> Because there had been no city-council district in New Orleans in 1961 with a majority of black voters—Stewart did not offer statistics on the proportion of black

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145. JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 177–78 (1996).

146. See generally KATHLEEN L. BARBER, *A RIGHT TO REPRESENTATION: PROPORTIONAL ELECTION SYSTEMS FOR THE TWENTY-FIRST CENTURY* 101–07 (2000) (describing the struggle over STV in Cincinnati and its racial overtones); Robert J. Kolesar, *PR in Cincinnati: From “Good Government” to the Politics of Inclusion?*, in *PROPORTIONAL REPRESENTATION AND ELECTION REFORM IN OHIO* 160, 171–73 (Kathleen L. Barber ed., 1995) (same); Gil Kujovich, *Potter Stewart, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993*, at 456, 456–60 (Clare Cushman ed., 1993) (recounting Justice Stewart’s political career).

147. African-Americans were “overrepresented” on the city council during Stewart’s two terms—comprising 15% of the population but holding two of the nine seats, with one black being placed on each of the two dominant slates, the Republican slate and the Charter slate. Kolesar, *supra* note 146, at 189. This was the high point of black political power in Cincinnati city government during the period. *Id.* at 190. With the repeal of STV, black council membership dropped to zero. *Id.*

148. See FairVote - IRV America, <http://www.fairvote.org/irv/> (advocating instant runoff voting and reporting its successes).

149. 425 U.S. 130 (1976).

150. *Id.* at 141.

registered voters later in the decade, after the VRA, registration drives, and white flight had no doubt increased it—the Justice ruled that the council’s 1973 plan “enhance[d] the position of racial minorities,” rather than “diluting or abridging the right to vote.”<sup>151</sup> But Stewart went on in the next sentence to provide another basis for denying preclearance, a basis that, announced by itself, would have been consistent with language from such previous cases as *South Carolina v. Katzenbach* and that would have satisfied the three dissenters in *Beer*: “[T]he new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.”<sup>152</sup> This could logically only have referred to the purpose inquiry that Judge Robinson had abjured, not to a constitutional *effect* standard.<sup>153</sup> It is careless of scholars to represent *Beer* as embodying the retrogression interpretation of Section 5, yet ignore the rest of the opinion, because the purpose standard of *Beer* strengthened the purpose prong of Section 5, the prong that underlay such a large proportion of Justice Department objections in the 1980s and 1990s.<sup>154</sup>

Stewart arrived at his nonretrogression standard by disregarding the text of the law, sidestepping Supreme Court precedents, and quoting very selectively from congressional reports. Section 5 merely stated (as of 1976) that a “qualification, prerequisite, standard, practice, or procedure” in a covered jurisdiction should not be allowed to go into effect unless it can be determined that it “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,”<sup>155</sup> not that it by itself will *further* disadvantage people of color. A law that replaced a poll tax with an equivalent registration fee, for instance, would not make blacks worse off, but it might have the purpose, effect, or both of abridging the right to vote because of race. Following the text of the VRA, Chief Justice Warren twice used the word *perpetuate* about Section 5 in his opinion for the Court in *South Carolina v. Katzenbach*. The Section required the D.C. District Court or the Justice Department, Warren remarked, “to determine whether [new voting regulations’] use would *perpetuate* voting discrimination”<sup>156</sup> because “Congress knew that some of the States covered

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151. *Id.*

152. *Id.*

153. Had Stewart meant to refer to a constitutional effect standard, instead of a purpose standard, as Justice Scalia later contended in *Reno v. Bossier Parish School Board (Bossier II)*, 528 U.S. 320, 337–38 (2000), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. § 1973c), Stewart’s argument would have been blatantly self-contradictory. The retrogressive-effect standard is more difficult to meet than a simple discriminatory-effect standard, which New Orleans had quite obviously violated, as Judge Robinson showed in such detail. If Stewart had meant what Scalia later said he meant, then the United States would have won in *Beer*.

154. Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 297–99 (2006).

155. 42 U.S.C. § 1973c (1976) (amended 2006).

156. *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966) (emphasis added).

by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of *perpetuating* voting discrimination in the face of adverse federal court decrees.”<sup>157</sup> The purpose of the VRA, Warren declared, was to “*rid* the country of racial discrimination”<sup>158</sup>—not to preserve the current discriminatory levels that had convinced an outraged country to pass the law in the first place, as Stewart’s standard presumed.

The effect standard in House Report 196, from which Stewart quoted in *Beer*, was “whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting *in view of the political, sociological, economic, and psychological circumstances within the community proposing the change*.”<sup>159</sup> Stewart cut off the quotation after the word *voting*,<sup>160</sup> thus eliminating the factors in the *Regester* totality-of-circumstances test. While it is possible that the House Committee meant *political circumstances* to cover only behavior and not such previously existing electoral provisions as at-large elections or majority-vote requirements, it is equally arguable that it meant to include rules among the behavioral patterns. Stewart shaved the quotation to make it seem that Judge Robinson had violated congressional intent, when in fact, Robinson had anticipated a very plausible interpretation of the House Report’s somewhat-ambiguous pronouncement.

Justice Stewart also ignored a statement in the 1975 Senate Judiciary Committee Report on the VRA that specifically praised Judge Robinson’s *Beer* decision and set forth a standard that unmistakably rejected any nonretrogression criterion:

In some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and *all aspects of such a change are within the reach of Section 5*. . . . For example, as in *Beer* . . . , Section 5 requires submission of the entire seven member council plan when New Orleans sought approval for a reapportionment of only the five single-member seats.<sup>161</sup>

The *Beer* nonretrogression test itself only partially cleared up the confusion about what constituted a discriminatory effect. In assessing the redistricting of the 1970s, the Justice Department had been inconsistent in defining a legal *change*: Sometimes, the Department had anticipated Judge Robinson and the 1975 Senate Report by considering the effect of a change in the context of the entire electoral structure; sometimes, it had, like Justice

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157. *Id.* at 335 (emphasis added).

158. *Id.* at 315 (emphasis added).

159. H.R. REP. NO. 94-196, at 60 (1975) (emphasis added).

160. *Beer v. United States*, 425 U.S. 130, 141 (1976).

161. S. REP. NO. 94-295, at 19 (1975) (emphasis added).

Stewart, isolated the effect of the very specific change.<sup>162</sup> After 1976, the Department followed Stewart.<sup>163</sup> But there was a larger question: Did nonretrogression mean a general change in the political status of a minority group, so that, for instance, annexation of a white suburban area by a central city could be balanced by shifting from an at-large system to single-member districts, keeping black political status roughly unchanged, or was each legal provision to be considered in itself, with the Department required to disallow any retrogressive section without any balancing?<sup>164</sup> The Supreme Court in *City of Richmond*<sup>165</sup> and *City of Lockhart*<sup>166</sup> tended toward the first position, while federal district courts, in cases like *Wilkes County*,<sup>167</sup> tended toward the second. The Justice Department in effect circumvented the question by increasingly considering such situations under the rubric of purpose, the provision of Section 5 that Stewart had left in its original condition, which encompassed both definitions of a change.<sup>168</sup>

#### *E. Retreat to Mobile, in Confusion*

*Beer* was a turning point, the first retrogression in voting rights since 1965. It began a series of judicial attacks on minority voting rights through restraints on the VRA. The attacks may be divided into two varieties—direct, through interpretations of the VRA, and indirect, through interpretations of the Constitution, constraining the VRA. Direct attacks like *Beer* reinterpreted benchmarks of discrimination or definitions of the status quo. Indirect attacks, such as *City of Mobile v. Bolden*,<sup>169</sup> involved reweighting and redefining intent and effect, narrowing the discretion

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162. As noted *supra* text accompanying note 138, the Justice Department had objected to the same New Orleans plan that Judge Robinson overturned. For other examples of Justice Department objections that considered the whole electoral structure, see Halpin & Engstrom, *supra* note 113, at 63–65. For examples of inconsistent Justice Department treatments of change before *Beer*, see Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 228–32 (1983).

163. See 28 C.F.R. § 51.54 (1987) (noting the Department’s reliance on the test from *Beer*); Motomura, *supra* note 162, at 191 n.15 (quoting a Justice Department objection letter declaring that in making a preclearance requirement, the Department seeks to make the “decision . . . the court would make if the matter were before it” and noting that this standard was codified in 28 C.F.R. § 51.39(a) (1981)).

164. See generally Motomura, *supra* note 162, at 228–32 (distinguishing between different meanings of retrogression).

165. See *City of Richmond v. United States*, 422 U.S. 358 (1975) (considering offsetting changes and allowing the balancing of considerations).

166. See *City of Lockhart v. United States*, 460 U.S. 125 (1983) (comparing the new election plan, in its entirety, with the old election system and finding no retrogression).

167. See *Wilkes County v. United States*, 450 F. Supp. 1171 (D.D.C. 1978), *aff’d*, 439 U.S. 999 (1978) (considering the change from the use of single-member districts to the use of an at-large voting system as the sole criterion for determining whether the changes were discriminatory in purpose and effect).

168. McCrary et al., *supra* note 154, at 298 tbl.3.

169. 446 U.S. 55 (1980).

granted to Congress in implementing the Fourteenth and Fifteenth Amendments.

But because the Fourteenth and Fifteenth Amendments and the VRA were stated broadly, as principles, rather than narrowly, like a commercial code, the courts themselves enjoyed wide discretion in framing interpretations. And with this freedom from textual constraint came the ability to issue contradictory decision after decision without having to overrule previous decisions, allowing seemingly absolute statements to be evaded effortlessly—but for the legal analyst, maddeningly—in subsequent opinions. Rather than battering down precedential barriers, the Justices outflanked or merely ignored them. The courts' interpretative freedom, the resistance of a Voting Section of the Department of Justice that was institutionally invested in minority voting rights, and the greater commitment of post-Nixon Administration legislators than of post-Warren Court Justices to protecting such rights combined to produce a judicial retreat from the Second Reconstruction that was halting and frequently reversed.

Justice Stewart's Gulf Coast journey took him east from New Orleans to Mobile, Alabama, where he arrived in 1980 with missing baggage—one fewer Justice endorsing his opinion than in *Beer*. Mobile had adopted a three-person commission form of government in 1911, elected at-large with numbered places and a majority-vote requirement, and although 35% of the city was black in 1970, no African-American had ever sat on the commission.<sup>170</sup> Efforts to establish single-member districts had been rebuffed in the legislature.<sup>171</sup> Claiming that the electoral scheme was maintained with a racially discriminatory purpose but, much more forcefully, that the factors outlined in *Regester* showed that it had a discriminatory effect, attorneys of the NAACP Legal Defense Fund (NAACP-LDF) convinced “Wiregrass Populist” Judge Virgil Pittman to declare the commission illegal.<sup>172</sup> Despite the fact that the plaintiffs had challenged the commission under the VRA, as well as the Fourteenth and Fifteenth Amendments, Pittman's opinion devoted little attention to the statute.<sup>173</sup> The Fifth Circuit affirmed,<sup>174</sup> and the city appealed to the U.S. Supreme Court, which issued a splintered decision, with a plurality opinion by Justice Stewart, joined by

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170. *Bolden v. City of Mobile*, 423 F. Supp. 384, 386–88 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55.

171. *See id.* at 397 (noting that a “courtesy rule” in the state legislature allowed local delegations to veto “any effective redistricting which would result in any benefit to black voters”).

172. *Id.* at 402.

173. *See id.* Pittman's avoidance of Section 2 was not unusual. Before 1980, only one case had been decided under Section 2, and that case, *Toney v. White*, 348 F. Supp. 188 (W.D. La. 1972), *aff'd in part, rev'd in part*, 476 F.2d 203 (5th Cir. 1973), *aff'd*, 488 F.2d 310 (5th Cir. 1973) (en banc), was not the subject of a U.S. Supreme Court opinion.

174. *Bolden v. City of Mobile*, 571 F.2d 238, 247 (5th Cir. 1978), *rev'd*, 446 U.S. 55.



Chief Justice Warren Burger and Justices Lewis Powell and William Rehnquist.<sup>175</sup>

The first part of Stewart's opinion formed a syllogism that, if left undisturbed, would have severely constrained the VRA. First, Section 2 of the VRA, he asserted, "no more than elaborates upon . . . the Fifteenth Amendment."<sup>176</sup> Second, the Fifteenth Amendment was violated only by laws that are "motivated by a discriminatory purpose."<sup>177</sup> Third, the Fifteenth Amendment protected only the right to vote, not any right to a fair electoral system. It followed that so long as blacks could "register and vote without hindrance," they could claim no remedy under the Fifteenth Amendment and, therefore, none under Section 2 of the VRA.<sup>178</sup> The overwhelming proof of racial discrimination and vote dilution in Mobile and, indeed anywhere, was consequently irrelevant to a Section 2 claim. Moreover, because the legislative purposes of Sections 2 and 5 were so similar, Stewart's opinion implied, although it did not specifically assert, that any prohibition of laws on the grounds of their discriminatory effects went beyond Congress's constitutional powers in *both* sections of the VRA. The Justice did not note the inconsistency of this analysis with the application of the VRA to electoral structures in *Allen* and even with the retrogressive-effect standard of *Beer*.

In his district court opinion in *Bolden*, Judge Pittman had relied less on the Fifteenth than on the Fourteenth Amendment, conducting an extensive factual examination to determine the totality of the circumstances under *Regester*.<sup>179</sup> Justice Stewart first recast *Regester*, which had previously been thought to be concerned with effects, as an intent case,<sup>180</sup> thus squaring it with *Washington v. Davis*<sup>181</sup> and discarding the Fifth Circuit's "codification" of *Regester* in *Zimmer v. McKeithen*.<sup>182</sup> But then, instead of aggregating the factors—considering them in their "totality"—Stewart divided them, concluding with a minimum of reasoning that no factor considered *alone* proved Mobile's discriminatory intent.<sup>183</sup> Stewart's test ripped apart *Regester* without formally overruling it. What disturbed Justice White, who dissented forcefully, was not Stewart's substitution of an intent for an effect

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175. See *Bolden*, 446 U.S. 55.

176. *Id.* at 60 (plurality opinion).

177. *Id.* at 62.

178. *Id.* at 65.

179. *Bolden v. City of Mobile*, 423 F. Supp. 384, 386–94 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238, *rev'd*, 446 U.S. 55.

180. See *Bolden*, 446 U.S. at 66 (plurality opinion) ("A plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" (alterations in original) (citation omitted)).

181. 426 U.S. 229 (1976).

182. 485 F.2d 1297, 1303–07 (5th Cir. 1973) (en banc), *aff'd sub nom. per curiam* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

183. *Bolden*, 446 U.S. at 73–74 (plurality opinion).

standard. After all, Justice White had written the opinion of the Court in *Washington v. Davis*, and his opinion in *Regester*, which made no clear distinction between intent and effect, fit well under either rubric. What concerned White, rather, was Stewart's apparent unwillingness to rely on objective evidence of intent and his replacement of the totality-of-circumstances inquiry with one that dismissed as insubstantial any factor that was not conclusive by itself.<sup>184</sup>

Although Justice Thurgood Marshall, in a dissent that was nearly twice as long as Justice Stewart's plurality opinion, specifically disavowed any constitutional right to proportional representation, he did contend that it was unnecessary to prove discriminatory intent in vote-dilution cases, and he asserted that voting deserved special protection as a fundamental right.<sup>185</sup> In a biting response that prefigured the Reagan Administration's position over the next two years, Justice Stewart scorned the view that voting was a fundamental right and equated an effect standard and any recognition of discrimination against African-Americans as a group with a "claim, however phrased, that the Constitution somehow guarantees proportional representation."<sup>186</sup> The battles for black recognition on the Cincinnati City Council slates left quite a mark on Potter Stewart.

If one ignored all the opinions except Stewart's, *Bolden* seemed a terrible blow to the VRA.<sup>187</sup> But Stewart did not command a secure majority for any position he took. Justice Harry Blackmun merely assumed an intent standard for the sake of argument. He thought the evidence proved Mobile's discriminatory purposes, and he concurred in the outcome only because he thought Judge Pittman's remedy, substituting a mayor-council form of government for the commission, went too far.<sup>188</sup> Justice John Paul Stevens did not agree to an intent standard, particularly not a subjective one, and he endorsed group voting rights.<sup>189</sup> Justices Brennan, White, and Marshall agreed with Blackmun that the evidence in the case supported a finding of discriminatory intent and stressed that they believed the Constitution perfectly

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184. *Id.* at 101-03 (White, J., dissenting).

185. *Id.* at 111 & n.7, 122 (Marshall, J., dissenting).

186. *Id.* at 79 (plurality opinion). Several decisions of the Supreme Court rendered during Stewart's tenure treated the right to vote as fundamental, notably *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626-27 (1969); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); and *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). Stewart fully joined two of the majority opinions in these cases: *Reynolds* and *Dunn*. None of these opinions has been specifically overruled by the Supreme Court, despite Stewart's view in *Bolden*.

187. See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355 (1983) (citing media coverage that characterized the decision as a "major defeat" and a "big[] step backward").

188. *Bolden*, 446 U.S. at 80-82 (Blackmun, J., concurring in the result).

189. *Id.* at 84-85 (Stevens, J., concurring in the judgment).

compatible with a discriminatory-effect standard.<sup>190</sup> Had Section 5 not been up for renewal in 1982, *Bolden* might have been treated as a murky ebb in the general flow of voting rights.

Stewart's blow to the VRA might also have seemed more glancing had observers paid more attention to another case decided on the same day as *Bolden*—*City of Rome v. United States*.<sup>191</sup> In 1966, Rome, Georgia, a covered jurisdiction under Section 5 of the VRA, adopted a majority-vote system, reduced the number of wards, and staggered the terms of its city commissioners and board of education.<sup>192</sup> It also carried out sixty annexations between 1966 and 1975.<sup>193</sup> It sought preclearance of none of these changes except one annexation in 1974, a move that led the Department of Justice to discover Rome's other actions.<sup>194</sup> The Department then required Rome to submit them for preclearance and, when it did, refused to validate most of them.<sup>195</sup> Rome sued in a three-judge federal court, lost, and appealed.<sup>196</sup>

Contrary to what one might have expected from reading the plurality opinion in *Bolden*, the United States conquered Rome, 6–3, with Justice Marshall writing the opinion of the Court and Justices Stewart, Powell, and Rehnquist in somewhat amazed dissent. Having failed to comply with Section 5 since the enactment of the VRA, Rome proposed to “bail out” of coverage before it had ever opted in.<sup>197</sup> Over the virulent protest of Justice Powell,<sup>198</sup> Justice Marshall and the majority followed the explicit guidance of the 1965 House and Senate Reports and rejected Rome's effort to secede from the coverage that affected the whole State of Georgia.<sup>199</sup>

Marshall then confronted the question of whether Congress could, under the Fifteenth Amendment, ban practices without proof of discriminatory intent, and he not only gave the opposite answer to Stewart's, he also cavalierly dismissed the necessity “to examine the various approaches expressed by the Members of the Court” in *Bolden* in a brief footnote, disrespecting the plurality opinion by not singling it out, even for condemnation.<sup>200</sup> Citing cases as far back as another Justice Marshall's

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190. *Id.* at 94 (Brennan, J., dissenting); *id.* at 94–95, 97 (White, J., dissenting); *id.* at 103–04, 112, 123 (Marshall, J., dissenting).

191. 446 U.S. 156 (1980).

192. *Id.* at 160. Terms of elected officials are said to be staggered when not all members of a body are elected at the same time.

193. *Id.* at 161.

194. *Id.*

195. *Id.*

196. *Id.* at 161–62.

197. *Id.* at 167.

198. *Id.* at 196 (Powell, J., dissenting).

199. *Id.* at 169 (majority opinion).

200. *Id.* at 173 n.11.

*McCulloch v. Maryland*,<sup>201</sup> the more recent Justice Marshall ruled that Congress had discretion in enforcing the Fifteenth Amendment with “appropriate” legislation, that it did not have to confine itself to banning practices that a court had found or would find violative of the Constitution, and that precedents from *South Carolina v. Katzenbach* on had ruled the VRA an appropriate use of congressional power.<sup>202</sup> In a passage clearly directed at Stewart’s plurality opinion in *Bolden*, Marshall concluded:

[W]e hold that the Act’s ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.<sup>203</sup>

While on its face, this judgment of appropriateness might seem to exempt from the VRA jurisdictions that were not covered under Section 5, it must be noted that the same suspicions that justified an impact standard for Section 5 would lead to an impact standard for Section 2 for places like Mobile, which was part of a covered jurisdiction, the State of Alabama. If Congress more clearly wrote an effect standard into Section 2, it would be constitutional under Marshall’s ruling in *City of Rome*, at least as applied to jurisdictions subject to Section 5. Finally, previewing issues much discussed in preparation for renewal of Section 5 in 2006, Marshall ruled that the VRA was not an unconstitutional infringement on state sovereignty, for the Reconstruction Amendments necessarily justified such an intrusion.<sup>204</sup> He also concluded that the VRA and Section 5 had not “outlived their usefulness by 1975,” in view of the length of time since the ratification of the Fifteenth Amendment in 1870 in which that Amendment had been effectively nullified.<sup>205</sup>

While Justice Powell’s dissent concentrated on the bailout issue, Justice Rehnquist, joined by Justice Stewart, challenged Marshall on more abstract grounds, referring pointedly to *Bolden*, beginning in the first sentence. To Rehnquist, as to Stewart in *Bolden*, only barriers to black voter registration, voting, and candidacy violated the Fourteenth or Fifteenth Amendments.<sup>206</sup> By this definition, Rome had not “engaged in any discrimination against blacks for at least 17 years.”<sup>207</sup> Applying the same standards to Section 5 as

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201. 17 U.S. (4 Wheat.) 316 (1819).

202. *City of Rome*, 446 U.S. at 174, 178–79.

203. *Id.* at 177 (footnote omitted).

204. *Id.* at 178–80.

205. *Id.* at 180, 180–82.

206. *Id.* at 208 (Rehnquist, J., dissenting).

207. *Id.* at 209.

Stewart had to Section 2, Rehnquist asserted that the Fourteenth and Fifteenth Amendments only allowed Congress to take remedial action to prohibit intentional discrimination.<sup>208</sup> While *Allen* and subsequent cases had held that Congress intended to ban electoral structures that had discriminatory effects, Rehnquist continued, they had not squarely confronted the questions of whether such structures were unconstitutionally discriminatory in themselves and, if not, whether Congress had the power to ban them anyway.<sup>209</sup> He concluded that because many jurisdictions all over the country had adopted at-large elections “as a reform measure designed to overcome wide-scale corruption in the ward system of government,” and because it was discrimination by individual white voters who refused to vote for black candidates, not governmental actions per se, that produced the discriminatory impact of electoral structures, such structures could not be purposefully discriminatory.<sup>210</sup> Congressional action to ban them could be justified only on the assumptions “that white candidates will not represent black interests, and that States should devise a system encouraging blacks to vote in a bloc for black candidates,”<sup>211</sup> assumptions that Rehnquist and Stewart obviously did not share.<sup>212</sup> Rehnquist did not consider whether politicians in states and counties who consciously organized their political structures in order to facilitate white bloc voting that would always or usually defeat blacks were engaging in intentional discrimination.

In *City of Rome*, Rehnquist and Stewart would not only have extended the judicial veto of congressional legislation banning laws with discriminatory effects to Section 5, they would also have prevented Congress from protecting anything more than the acts of voting and running for office. It was a radical position—and it attracted only two votes.

#### F. Washington Outlook: Overcast

In 1980, with two years to go before Section 5 was scheduled to expire, the VRA’s provisions seemed less clear and more shaky than at any previous time in the Act’s history. Although Section 5 explicitly and Section 2 implicitly encompassed both purpose and effect, Section 2’s effect standard had been stripped off, at least according to the four-Justice *Bolden* plurality. Section 5 retained its effect standard, but in stunted form, banning only those changes that made minorities worse off than they had been. Despite the fact that all nine Justices repeatedly agreed that no section of the VRA guaranteed proportional representation, conservative Justices and many even less

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208. *Id.* at 210–18.

209. *Id.* at 211–12.

210. *Id.* at 217, 216–17.

211. *Id.* at 218.

212. *See id.* (“The findings in this case alone demonstrate the tenuous nature of these assumptions.”).

judicious critics never tired of charging liberal Justices with a craving for quotas.<sup>213</sup> While the *Bolden* plurality rested the Act solely on the narrowly stated and rarely litigated Fifteenth Amendment, Rehnquist and Stewart in their *City of Rome* dissent noted that several prior cases connected the VRA to the much more expansive Fourteenth Amendment, and they recognized the joint paternity of the two constitutional Amendments.<sup>214</sup> More liberal Justices seemed to care less about the exact fatherhood of the VRA than about the tests used to evaluate evidence in voting rights cases. Instead of trying to overturn *Regester* explicitly, the *Bolden* plurality recast its framework as one about intent, which made *Regester* relevant to the VRA whether it was necessary under the statute to prove intent or effect. By failing to kill *Regester*, the *Bolden* plurality had unintentionally made it applicable to a wider range of cases. Meanwhile, local and state jurisdictions were increasingly including Section 5 submissions in their bureaucratic routines, and the Justice Department was leaning more and more on *Beer's* exception to the retrogression standard, which allowed it to refuse preclearance to schemes that it concluded violated the Constitution, whether or not they led to a retrogression in minority political status.<sup>215</sup> In all, the Judiciary and the Executive had created a great deal of confusion at just the time when jurisdictions were flooding the Department of Justice with submissions and civil rights groups had begun to file a wave of Section 2 challenges to noncovered jurisdictions and to pre-1964 laws everywhere. To simplify or, to be more realistic, to complicate matters further, Congress was about to revisit the Act.

#### IV. Rebirth

##### A. *Renewal*

Because there have been no studies of the entire first forty-plus years of the VRA, two odd facts have gone largely unnoticed. First, every renewal of the VRA has taken place during a Republican presidential administration, which, with varying degrees of intensity, favored weakening or deleting

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213. See *City of Mobile v. Bolden*, 446 U.S. 55, 75–76 (1980) (plurality opinion) (“Whatever appeal the dissenting opinion’s view may have as a matter of political theory, it is not the law. The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization. The entitlement that the dissenting opinion assumes to exist simply is not to be found in the Constitution of the United States.”); Boyd & Markman, *supra* note 187, at 1397–403 (quoting Assistant Attorney General for Civil Rights Bradford Reynolds, Dr. Walter Berns, Senator Orrin Hatch, and others as charging that a results test in Section 2 would lead to the use of “quotas” or “proportional representation”).

214. *City of Rome*, 446 U.S. at 207 n.1 (Rehnquist, J., dissenting). The 1965 House Report rests the VRA on the Fourteenth and Fifteenth Amendments and Article I, Section Four. H.R. REP. NO. 89-439, at 6 (1965).

215. Motomura, *supra* note 162, at 242–45. Submissions totaled 5,976 from 1971 through 1975, but they totaled 25,857 from 1976 through 1980. BALL ET AL., *supra* note 25, at 248–49.

Section 5 and opposed significantly expanding other provisions of the Act.<sup>216</sup> Second, and in particular, the VRA was rejuvenated and the Act reached the apogee of its authority during the twelve years of the most conservative presidential regimes since that of Calvin Coolidge. The most southern-dominated administrations since Woodrow Wilson not only failed to reverse the central political result of the Second Reconstruction but actually, grudgingly, presided over its expansion.

The 1975 renewal had gone relatively easily, as the Democratic sweep in the 1974 “Watergate election” had given liberals more power in Congress than they had enjoyed in 1970. The principal change was an extension of voting protections to “language minorities” under a new section numbered 203.<sup>217</sup> Efforts to drop Section 5 entirely or to dilute it by extending it nationwide, which was designed to overwhelm the understaffed Voting Section with so many submissions that scrutiny of any one would be completely superficial, failed in the Senate.<sup>218</sup> The most serious such proposal, by Georgia Democrat Sam Nunn, lost by only 48–41, with half of the Republicans who voted and nine northern Democrats joining fifteen of seventeen southern Democrats in favor of effectively scuttling preclearance.<sup>219</sup> Knowing how critical Section 5 had been in the redistricting of the 1970s, the House passed a ten-year, rather than a five-year, extension of Section 5 so that it would not run out just as redistricting was beginning in the 1980s.<sup>220</sup> Unelected President Gerald Ford, who as House Minority Leader in 1970 had led Nixon’s effort to delete Section 5, at first endorsed the 1975 bill, then withdrew his support during the time when the Senate was considering it, apparently feeling the warm breath of a right-wing challenge for the Republican presidential nomination from Ronald Reagan, and finally reversed himself again in the face of criticism from more moderate

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216. Tucker, *supra* note 12, at 206. The Ford Administration in 1975 did not oppose the addition of coverage for those who speak “minority languages.” 142 CONG. REC. 21,185 (1996) (statement of Rep. Conyers). The George W. Bush Administration was a partial exception, declining to take any firm position at all on the legislation until July 13, 2006, the day the House voted on the bill. Tucker, *supra* note 12, at 251. The Senate acted just a week later. *Id.* at 264.

217. See Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, sec. 203, § 4(f), 89 Stat. 400, 401–02 (1975) (codified as amended at 42 U.S.C.A. § 1973b (West 2003 & Supp. 2007)) (amending the Voting Rights Act to add Section 203, which along with amendments necessary to its application comprise the bulk of the Act’s text).

218. STEVEN F. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941*, at 187 (1991); see also Days & Guinier, *supra* note 18, at 172–73 (discussing a similar proposition made during debates concerning the 1982 extension of Section 5).

219. See 121 CONG. REC. 24,766, 24,766–69 (1975) (reporting the introduction of, and voting upon, Senator Nunn’s amendment to “provide permanent coverage of section 5 on a nationwide basis”).

220. See *Congress Clears Voting Rights Act Extension*, 31 CONG. Q. ALMANAC 521, 525 (1975) (discussing the argument in favor of a ten-year extension by Arthur Fleming, Chairman of the U.S. Commission on Civil Rights).

quarters.<sup>221</sup> Unmoved by, though perturbed at Ford's stumbling shifts, the Senate eventually passed the bill by 77–12 with a compromise seven-year extension, and the House, under pressure to act quickly as the deadline for renewal approached, acquiesced in the Senate amendments without convening a two-house conference committee, 346–56.<sup>222</sup>

Yet the liberal failure in 1975 to extend Sections 5 and 203 for ten years turned out to be fortuitous, for the necessity to consider extension gave the civil rights forces an opportunity to overturn *Beer* and the plurality opinion in *Bolden*.<sup>223</sup> Two characteristics of those decisions lent themselves to legislative attack—their sharp departures from previous Supreme Court rulings and congressional understandings and the unwillingness or inability of their authors to overrule those previous judgments explicitly. Liberals could, with considerable evidence, represent themselves as conservatives merely trying to restore the status quo as it existed before the radical *Beer* and *Bolden* decisions.<sup>224</sup>

Two more factors shaped the congressional debate of 1981–1982 in a surprising fashion. First was the 1980 triumph of Ronald Reagan and the “movement conservatives” who had long ago hitched their horses to his movie-prop chariot. Before 1981, Democrats had controlled both houses of Congress every time the VRA had been considered.<sup>225</sup> In the 1980 election, Republicans gained control of the Senate, putting South Carolina's Strom Thurmond, the 1948 Dixiecrat candidate for president, in command of the Judiciary Committee.<sup>226</sup> Ronald Reagan had opposed the passage of the Civil Rights Act in 1964<sup>227</sup> and the VRA in 1965,<sup>228</sup> and he had won his first office, as California governor, partly on the white backlash against the state's 1963 Rumford Act against racial segregation in the sale and rental of housing, a backlash he actively stimulated as spokesman for Proposition 14, which repealed the fair-housing law.<sup>229</sup> Because proponents of voting rights

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221. LAWSON, *supra* note 218, at 187.

222. *Congress Clears Voting Rights Act Extension*, *supra* note 220, at 529–33.

223. See Derfner, *supra* note 43, at 149 (noting that the 1982 expiration date ensured a lively debate on voting rights issues and that this created an opportunity to overturn *Bolden*).

224. See S. REP. NO. 97-417, at 19–24 (1982) (arguing that the proposed amendment to Section 2 would return to the original legislative intent by restoring the legal standard that governed voting discrimination prior to the Supreme Court's decision in *Bolden*). The parallels with the liberal stance on *Georgia v. Ashcroft* and *Reno v. Bossier Parish School Board* (*Bossier II*) in 2006 relieved anyone of the necessity of learning new lines.

225. See Office of the Clerk of the U.S. House of Representatives, Party Divisions of the U.S. House of Representatives (1789 to Present), [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html](http://clerk.house.gov/art_history/house_history/partyDiv.html); Senate Historical Office of the United States Senate, Party Division in the Senate, 1789 to Present, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_tasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm).

226. William M. Welch, *Former Senator Thurmond Dies*, USA TODAY, June 26, 2003, available at [http://www.usatoday.com/news/washington/2003-06-26-strom\\_x.htm](http://www.usatoday.com/news/washington/2003-06-26-strom_x.htm).

227. LOU CANNON, REAGAN 111 (1982).

228. LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 520 (1991).

229. See CANNON, *supra* note 227, at 111 (describing Reagan's support for Proposition 14 as helpful to his candidacy).



feared that Reagan, Thurmond, and Senate Judiciary Subcommittee Chair Orrin Hatch would undermine or derail the Act, they knew they had to organize early and fight long and hard.<sup>230</sup> All of their gains in the last decade were at stake. The combination of danger with opportunity was bracing.

A second factor was the transformation of southern politics, which was partly the product of the VRA itself. While covered southern jurisdictions had by 1981 become accustomed to the bureaucratic routine of preclearing their election laws, black southerners feared, with considerable historical justification, that if the VRA were weakened, their newfound political power would dissolve or at least lessen. Thus, white southerners no longer fought the law, while black southerners insisted on its strengthening.<sup>231</sup>

When he signed the much-enhanced VRA into law on June 29, 1982, President Reagan, without the slightest hint of his Administration's vehement opposition to the amended Act, pronounced the right to vote "the crown jewel of American liberties" and asserted that the enactment of the VRA "proves our unbending commitment to voting rights."<sup>232</sup> The bill's passage by the House, 389–24, and the Senate, 85–8, at once revealed the national consensus in favor of equal political rights for minorities and concealed the difficult struggles and stealthy victory of the VRA's proponents, organized as inside and outside lobbyists by the Leadership Conference on Civil Rights (LCCR).<sup>233</sup> Each side played complicated legislative games, but the voting rights forces were more ambitious, pragmatic, and united, and they won a startlingly easy victory for the strongest voting rights law in American history.

Both sides in the 1981–1982 debates engaged in creative misreadings of judicial opinions and the selective exaggeration typical of public-policy discussions. To rally support for changes in the VRA, the LCCR, sympathetic members of Congress, and newspaper editorial boards often treated Stewart's *Bolden* plurality opinion as solid authority, yet ignored the fact that it was based on the Constitution, not a statute.<sup>234</sup> Congress can overturn a court's interpretation of a statute, but not one based on the Constitution. If the civil rights forces had accepted Stewart's syllogism<sup>235</sup> as the authoritative statement of current law, they would have been unable to

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230. See Boyd & Markman, *supra* note 187, at 1351 ("[G]roups within the institutional civil rights community began to organize for what they anticipated would be a difficult political fight.").

231. *Id.* at 1387–88.

232. President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm>.

233. *House Passes Bill to Extend Voting Rights Act*, 37 CONG. Q. ALMANAC 415, 415–18 (1981); *Voting Rights Act Extended, Strengthened*, *supra* note 3, at 376.

234. The discussion in the S. REP. NO. 97-417, at 41 (1982) masterfully blurs the constitutional and statutory lines.

235. See *supra* text accompanying notes 176–78.

argue that all Congress needed to do to overturn it was to amend Section 2 of the VRA to restore its original intent to ban laws that had discriminatory effects. Yet the other side was just as creative, pretending that Section 2 and the Fourteenth and Fifteenth Amendments had always been interpreted to require proof of discriminatory intent.<sup>236</sup> Had “conservatives” carried out the implications of that view, they would have had to acknowledge that it suggested that the reapportionment cases—*Baker v. Carr* and its progeny—and every case involving the VRA before 1980 were implicitly overturned by *Bolden* because none of them had been explicitly decided on intent grounds. Several conservatives also misrepresented the civil rights leadership as opposing changes in Section 2, a charge easily and embarrassingly refuted.<sup>237</sup> While the LCCR and its allies exaggerated the difficulty of proving intent<sup>238</sup> and the *Washington Post* called it “virtually impossible,”<sup>239</sup> the Reagan Administration and its confederates exaggerated the ease with which electoral structures would fall if an effect standard were written into Section 2, hyperventilating that every legislative body in the country elected at large in which minorities lacked proportional representation would instantly be declared illegal.<sup>240</sup> Despite the fact that the main battle was over Section 2, which applied nationwide, not just in the largely southern covered jurisdictions, no one presented any evidence of the extent of racial discrimination in political processes outside the South.<sup>241</sup> Each side paid much less overt attention to what had always been the VRA’s most controversial provision, Section 5, arguing principally about the details of the bailout mechanism, the way states or localities escaped having to preclear their election laws.<sup>242</sup> *Bolden* was the issue, not *Beer*. Yet as we shall see, the Justice Department and the courts were instructed that the 1981–1982 amendments to Section 2 were to determine their interpretation of Section 5. It was a strange and oblique debate.

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236. See S. REP. NO. 97-417, at 130–31.

237. Boyd & Markman, *supra* note 187, at 1394–95.

238. See Derfner, *supra* note 43, at 153 (stating that during the House subcommittee hearings at least thirty witnesses testified to the “difficulty or near impossibility of proving discriminatory purpose in even the most egregious violations”).

239. Editorial, *Voting Rights: Be Strong*, WASH. POST, Jan. 26, 1982, at A18.

240. See S. REP. NO. 97-417, at 151–58 (suggesting that any electoral law in any governmental unit in the country might be subject to court-ordered restructuring in cases where minorities lacked proportional representation).

241. Boyd & Markman, *supra* note 187, at 1394 n.231. In contrast, in 2006 when Section 2 was not endangered, Professor Ellen Katz presented a complete analysis of Section 2 legal cases from 1982 through 2005, 52% of which were filed outside covered jurisdictions. Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006, at 183, 215 (Ana Henderson ed., 2007).

242. See S. REP. NO. 97-417, at 43–62 (outlining the lengthy discussion regarding the bailout mechanism); Boyd & Markman, *supra* note 187, at 1369–91 (discussing the lengthy full-committee debate over the bailout mechanism but paralleling the committee’s actions by giving relatively little attention to concerns over Section 5).

The House considered the bill first. After extensive hearings, many proposals, and much negotiation between Republicans and Democrats, often including representatives of the LCCR, the House Judiciary Committee voted 23–1 for a bill that inserted an explicit results test into Section 2, but included a provision stating that a lack of proportional representation was not in and of itself proof of a violation; extended Section 5 permanently; and made it somewhat easier for local jurisdictions to escape coverage of Section 5, thus undercutting part of the holding in *City of Rome*.<sup>243</sup> In an implicit rejection of the *Beer* nonretrogression test, however, the bill allowed jurisdictions to bail out only if they eliminated methods of election that denied “equal access” to the political process, which was interpreted by the Justice Department to mean that they had to rid their laws of at-large elections, majority-vote requirements, and similar procedures—not just avoid adopting such laws anew.<sup>244</sup> Along the way, negotiators rejected attempts to weaken Section 5, the most radical one being to require preclearance of laws only after a federal court’s judgment that a jurisdiction had previously engaged in a pattern or practice of discrimination.<sup>245</sup> On the House floor, unfriendly amendments were overwhelmingly voted down and the Judiciary Committee’s bill passed.<sup>246</sup>

At the beginning of the process, some civil rights leaders favored settling for a simple extension of Section 5 and no amendment to Section 2. By the time of the House passage, a continuation of the status quo was the best outcome that *opponents* of minority rights could hope for. Divided internally, the Reagan Administration waited too long, failing to take a public position on any aspect of the bill until after the House had passed it and sponsors had employed extensive grass-roots and senator-to-senator lobbying to line up a filibuster-proof sixty-one-vote majority for the House bill in the Senate. As insurance against a Judiciary Committee roadblock, liberals had initiated an obscure parliamentary maneuver that would allow the House bill to be placed on the Senate calendar without the Judiciary Committee’s approval, if that proved necessary.<sup>247</sup> The bill’s momentum was palpable.<sup>248</sup>

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243. See Days & Guinier, *supra* note 18, at 174–75 (describing the bailout provisions in the 1981 House bill); Derfner, *supra* note 43, at 151–53 (describing the drafting of the 1981 House bill and the vote in the House Judiciary Committee).

244. Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 420 (1985).

245. *House Opens Hearings on Voting Rights Act*, 39 CONG. Q. WKLY. REP. 819, 819 (1981); *House Passes Bill to Extend Voting Rights Act*, *supra* note 233, at 418.

246. See H.R. REP. NO. 97-227, at 42–43 (1981) (detailing bailout provisions in the bill); Days & Guinier, *supra* note 18, at 174–76 (recounting the House actions on the bailout provisions); Derfner, *supra* note 43, at 152–54 (recounting the exhaustive hearings before the House Judiciary Committee, the Committee’s adoption of the bill, and the bill’s passage in the House).

247. *House Passes Bill to Extend Voting Rights Act*, *supra* note 233, at 418.

248. See generally *id.* at 415–18 (discussing the strong growth in support for the Act); Boyd & Markman, *supra* note 187, at 139–51 (same).

Senator Orrin Hatch, then Chairman of the Senate Judiciary Subcommittee on the Constitution, tried to halt that momentum with witnesses, calling conservative professor after professor, backed by a Justice Department that tried to make up for in zeal what it lacked in timing.<sup>249</sup> Abandoning any effort to phase out Section 5 through a much weaker bailout or incapacitate it by applying it to every local and state government in the nation, which had been the Administration's first suggestions, Justice Department officials announced that the President favored a ten-year extension of Section 5, not making it permanent, as the House had; an unspecified bailout provision, but one less stringent than the House had passed; and a pure intent standard for Section 2.<sup>250</sup> In their testimony, Administration witnesses and their compatriots chanted one refrain: Anything except Stewart's opinion in *Bolden* would lead inevitably to the proportional representation of minorities, a horrifying specter to them, compared to the grossly disproportionate *over*representation of whites, which had always been the American way.<sup>251</sup>

Yet however potent the opponents' rhetorical ploy of equating an effects test with quotas,<sup>252</sup> it was a tactical mistake, easily countered. If the House bill's renunciation of proportional representation was not enough, that renunciation could be expanded in the text of the law and in the extremely detailed and explicit Senate Report on the Act. When the Senate Judiciary Committee threatened to deadlock, former Republican national chairman and vice-presidential candidate Robert Dole, one of the two undeclared members of the Judiciary Committee at the time, negotiated a much wordier guarantee with the bill's sponsors, which stated that Section 2's results test did not establish a right to proportional representation and that a failure to elect members of a "protected class," such as African-Americans, in proportion to their population was only "one circumstance" of the totality of circumstances that had to be assessed to prove a violation.<sup>253</sup> VRA supporters happily accorded the Kansas Republican full and highly public credit for the "Dole

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249. See S. REP. NO. 97-417, at 139-51 (1982) (quoting from the testimony of conservative professors and lawyers).

250. Boyd & Markman, *supra* note 187, at 1385-87.

251. See *id.* at 1397-403 (recounting the Senate subcommittee debate over whether the results standard would inevitably lead to proportional representation); Days & Guinier, *supra* note 18, at 172-74 (recounting House actions on Section 5); Memorandum from John G. Roberts, Jr., Special Assistant to the Att'y Gen., to William French Smith, Att'y Gen. of the United States (Jan. 26, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/025-voting-rights-act/folder025.pdf#page=4> (warning about proportional representation).

252. See Memorandum from John G. Roberts, Jr., Special Assistant to the Att'y Gen., to William Brad Reynolds, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice (Feb. 23, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/016-voting-rights/folder016.pdf#page=12> (arguing that the incorporation of an effects test would essentially establish a quota system).

253. Boyd & Markman, *supra* note 187, at 1415, 1414-15.

Compromise.”<sup>254</sup> Facing a bill now certain to come to the floor, with one of his party’s most prominent leaders as the public face of the effort, and backed by veto-proof majorities in both houses, President Reagan did a quick, total costume change and joined the celebration of the Act’s renewal as though he had always been planning to attend.<sup>255</sup>

The ninety-seventh Congress’s undermining of *Beer* attracted much less attention than its attack on *Bolden*, and the hearings and floor discussion devoted little attention to the definition of effect under Section 5.<sup>256</sup> But revisions of both major sections of the bill were intertwined from the beginning. As noted above, the House bailout criteria required a jurisdiction to show not only that the rights of its minority citizens had not retrogressed since 1964, but also that it had eliminated barriers to effective minority political power, such as at-large elections. The Senate adopted that part of the House bill without amendment.<sup>257</sup> The Senate Judiciary Committee also indicated in a striking footnote to its report:

Under the rule of *Beer v. United States*, a voting change which is ameliorative is not objectionable unless the change “itself so discriminates on the basis of race or color as to violate the Constitution.” In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.<sup>258</sup>

That is, the amendments to Section 2 were meant also to eliminate the nonretrogression test that Stewart had imposed on Section 5.<sup>259</sup> The Congress aimed at *Bolden*, but according to the Senate Report and statements

254. Although “[f]ormulated in coordination with representatives of the Leadership Conference,” *id.* at 1414, the amendment was universally known as the Dole Compromise, see Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 EMORY L.J. 1, 10–11 (1987) (crediting Senator Dole with developing the compromise). The Kansas Senator was given named credit for it in the published accounts of the 1982 legislative events by two of the most prominent civil rights lobbyists of the 1981–1982 renewal campaign, as well as other standard accounts. See, e.g., Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 21, 34 (Chandler Davidson & Bernard Grofman eds., 1994) (explaining that changes to the bill sought by the “voting rights bar” were made thanks to Dole); Derfner, *supra* note 43, at 155 (recounting Dole’s role in drafting the language of the amendment); Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 748 (1983) (noting that the agreement was termed the Dole Compromise).

255. See STEVEN A. SHULL, A KINDER, GENTLER RACISM?: THE REAGAN-BUSH CIVIL RIGHTS LEGACY 166 (1993) (detailing Reagan Administration actions); Derfner, *supra* note 43, at 154–56 (recounting Senate and lobbyist actions).

256. Boyd & Markman, *supra* note 187, at 1421 n.365.

257. See *id.* at 1415 (noting that the sole change to Section 5 provided by the “Dole Compromise” amendment replaced the permanent extension provided in the House bill with a twenty-five-year extension).

258. S. REP. NO. 97-417, at 12 n.31 (1982) (citations omitted).

259. For a less explicit statement of the same point, see H.R. REP. NO. 97-227, at 28 (1981).

on the House and Senate floors by two of the most prominent sponsors of the bill, Senator Edward Kennedy, a Democrat, and Representative James Sensenbrenner, a Republican, Congress meant the bullet to ricochet and hit *Beer* as well.<sup>260</sup>

Congress could have been more forceful and amended the text of Section 5, explicitly stating that it meant to impose the same effects test that courts had found in the Fourteenth Amendment. But critics who downplayed the importance of the footnote<sup>261</sup> bear a heavy burden of proof, even if we concentrate only on the text. First, the text itself only mentioned *effect*, not *retrogressive effect*. Second, after the 1982 amendments, the results test for Section 2, which applied nationally, was actually stronger than the retrogressive-effects test of Section 5, which covered only the most suspect jurisdictions in the country. Those who doubt that Congress meant to connect Sections 2 and 5 must believe that Congress desired to perpetuate this paradoxical double standard.<sup>262</sup> Third, Justice Stewart's opinion in *Beer* itself rested wholly on a partially quoted sentence from a congressional report.<sup>263</sup> What could have been more appropriate than to employ the same type of authoritative document on the intent of Congress—this time, relieving the Court of the necessity of quoting out of context and ignoring contrary statements in other congressional reports—to overturn a Supreme Court decision that rested solely on congressional intent? It is more than a bit contradictory for the “conservative” side, which spent the 1981–1982 renewal debate insisting on an intent standard, to undermine one of the two major achievements of that struggle (overturning *Bolden* and *Beer*) later by substituting a nontextual reading of Section 5 for footnote thirty-one's admirably clear and explicit statement of congressional intent.

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260. See generally Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 39–45 (1983) (discussing evidence that Congress intended to apply Section 2 standards to Section 5); Laughlin McDonald, *Racial Fairness—Why Shouldn't It Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 847–48 (1992) (reviewing congressional and judicial action on the issue of the connection between Section 2 and Section 5); Miller & Packman, *supra* note 254, at 12 n.49 (discussing the intent of Congress regarding the relationship between Section 2 and Section 5). The ricochet strategy, presumably pursued because voting rights advocates feared a diffusion of focus if they raised too many issues, was probably a mistake. The connection between Section 2 and Section 5 might have seemed stronger to judges if it had been linked more publicly. But given the judiciary's extreme hostility to the Justice Department's exercise of power, as evidenced in *Miller v. Johnson*, 515 U.S. 900 (1995) and its successors, it is unlikely that a less stealthy strategy in 1982 would have made any difference.

261. See, e.g., *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 63 (1986) (statement of Katharine I. Butler, Associate Professor of Law, University of South Carolina).

262. See generally Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 152 (1984) (pointing out the inconsistency of the double standard with congressional reports).

263. See *supra* notes 159–60 and accompanying text.

### B. *Reruns*

A few days before the Dole Compromise was announced, Judge Virgil Pittman issued his decision that the plaintiffs had proven that Mobile had adopted its at-large systems for electing city commission and school-board members with a racially discriminatory intent.<sup>264</sup> After Stewart's opinion, the NAACP-LDF and Justice Department attorneys had employed historians, including the author, to detect the motives of the framers of Mobile's at-large schemes, which the historians traced back to 1874 for the city government and 1876 for the board of education.<sup>265</sup> Immediately after the *Bolden* remand decision was announced, Reagan Justice Department officials attempted to use it as evidence that civil rights forces trying to amend Section 2 had no valid fears, thus using one hard-won, but short-term victory for minority rights to try to stave off a larger, longer term defeat for the Administration.<sup>266</sup>

But the Administration's argument was unconvincing for two reasons. First, the historians did not adopt Stewart's one-consideration-at-a-time form of assessing purpose but painted the whole historical context in which the crucial decisions were made.<sup>267</sup> *Bolden* was not overturned with the weapons Stewart provided. Second, the Administration attorneys, addressing Congress, did not discuss the position of their then-favorite Justices in *City of Rome*, which contradicts that of Pittman's remand decision in *Bolden* and sets out an intent standard that is much more difficult to meet than Stewart's in his *Bolden* Supreme Court opinion. In their *City of Rome* dissent, Rehnquist and Stewart implied that because at-large systems were not in themselves racially discriminatory, they could not become so because of the subjective motives of those who adopted them or of the white blocs that formed under them to deny African-Americans their preferred representatives.<sup>268</sup> While the civil rights forces had often castigated what

264. See *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982).

265. Peyton McCrary, *History in the Courts: The Significance of Bolden v. the City of Mobile*, in MINORITY VOTE DILUTION, *supra* note 18, at 47, 47–49.

266. See, e.g., Letter from Robert A. McConnell, Assistant Att'y Gen., U.S. Dep't of Justice, to Strom Thurmond, Chairman, U.S. Senate Comm. on the Judiciary 1 (Apr. 16, 1982) (on file with the Texas Law Review) (alerting Senator Thurmond to the decision made on remand and arguing that it showed that the intent standard was "not unduly difficult" to meet).

267. Peyton McCrary and I researched, organized, and presented the historical testimony for the plaintiffs in the *Bolden* remand.

268. See *City of Rome v. United States*, 446 U.S. 156, 217 (1980) (Rehnquist, J., dissenting). For discussion of Rehnquist's dissent in *City of Rome*, see *supra* notes 206–12 and accompanying text. Contending that the 2006 VRARA might not be sustained by the Supreme Court on an intentional discrimination theory, Daniel Tokaji mistakenly attributes the position that only Justices Rehnquist and Stewart took in *City of Rome*—that racial bloc voting is not state action and therefore cannot count in assessing whether intentional racial discrimination took place—to the Supreme Court in general. See Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 361–62 (2006) ("The problem with [connecting racial bloc voting and intentional discrimination] is establishing that the racist voting of private citizens may be attributed to the state . . . . Ever since the *Civil Rights Cases*, the Supreme Court has held that the

they characterized as *Bolden*'s subjective-intent standard during the 1981–1982 debates, focusing on the motives of those who were responsible for enacting a particular law at least holds open the possibility of concluding that the law was discriminatory. The position that certain types of laws are non-discriminatory per se does not.

The *Bolden* remand decision was not the only indication that the permutations of intent and effect were more complicated than they appeared in the congressional debate. In its detailed guidance for the Justice Department and the courts on how to implement and interpret the amended VRA, Senate Report 417 listed seven factors to be considered in Section 2 cases, drawing them not from hearings, congressional studies, or judicial opinions in Section 2 cases, but from *Regester*, a case brought under the Fourteenth Amendment.<sup>269</sup> Justice Stewart's opinion in *Bolden* had treated the VRA as authorized by the Fifteenth Amendment, not the Fourteenth, and it had interpreted *Regester* as an intent case, not an effect case.<sup>270</sup> But here was the Congress, overturning *Bolden* and declaring that the *Regester* factors were to be used to determine, under a statute, whether an election law had a racially discriminatory *effect*! It was an illustration of how closely related evaluations of intent and effect were and how interchangeable members of Congress considered statutes and constitutional provisions.

Two days after President Reagan signed the amended VRA, the Supreme Court showed that it shared the congressional disregard for nice legal distinctions by outfitting *Regester* in intent garb. In a 6–3 decision by Justice White, the Court overturned Stewart's opinion in *Bolden* without exactly saying so.<sup>271</sup> In the early twentieth century, rural, majority-black Burke County, Georgia, had established an at-large county commission elected with numbered posts by majority vote.<sup>272</sup> The principal distinction between *Rogers v. Lodge*<sup>273</sup> and the first *Bolden* case was that the district and appeals court judges who decided the Burke County case were more careful to phrase their opinions in the language of intent. Pointing out that the vote in *Bolden* on whether discriminatory intent had been proven was 4–4, with Justice Stevens taking no position on the issue, Justice White invoked the *Regester* factors to analyze intent much more coherently than the now-retired Justice Stewart had in *Bolden*.<sup>274</sup> Doing so picked up not only the vote of Justice Blackmun, who had been ambivalent in *Bolden*, but that of Chief Justice Burger, who had joined Stewart in *Bolden*, and of Stewart's replacement,

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Fourteenth Amendment may be violated only by *state action*, not by private action.” (citation omitted)).

269. S. REP. NO. 97-417, at 28–29 (1982).

270. *City of Mobile v. Bolden*, 446 U.S. 55, 60, 66 (1980) (plurality opinion).

271. *See Rogers v. Lodge*, 458 U.S. 613 (1982).

272. *Id.* at 614–15.

273. 458 U.S. 613 (1982).

274. *Id.* at 620, 622–27.



Justice Sandra Day O'Connor.<sup>275</sup> And not only did Justice White's intent analysis in *Lodge* look almost exactly like what Congress had just advised judges to perform under the heading of effect, but the criticisms of White's opinion by the three dissenters, Justices Powell, Rehnquist, and Stevens, echoed the liberals' criticisms of Stewart's opinion in *Bolden* during the 1981–1982 debate—that proving “subjective” intent was itself subjective, judicially unmanageable, and inherently political.<sup>276</sup> Two years, one judicial replacement, and a highly visible congressional debate, and no one was defending *Bolden* anymore. Some might have wondered whether the epic battle of 1981–1982 had been entirely necessary.<sup>277</sup>

The other 1982 battle, the *Beer* battle, continued for another five years in courts, within the Reagan Justice Department, and between the Department, voting rights lawyers, and sympathetic members of Congress. Even before footnote thirty-one, the District of Columbia District Court had sidestepped *Beer*'s retrogression standard in two ways—by recalculating the status quo benchmark and by emphasizing the purpose prong of Section 5. Indeed, after analyzing over 800 Justice Department objection letters written before 1983, Hiroshi Motomura concluded that compared with proof of vote dilution or racially discriminatory purpose, “the retrogression prong of the *Beer* analysis has had relatively little impact on the development of the substantive law of section 5.”<sup>278</sup> For example, the Wilkes County, Georgia, Board of Commissioners shifted during the 1970s from a malapportioned single-member-district system, in which African-Americans comprised no more than 37% of the registered voters in any district, to an at-large system with staggered terms and a majority-vote requirement, in which only 29% of the registered voters were black.<sup>279</sup> The Justice Department refused preclearance, and in *Wilkes County* the District of Columbia District Court compared the newer system not just with the old, malapportioned districts but also with a hypothetical set of equally populated districts.<sup>280</sup> The court concluded that the new plan had both a discriminatory purpose and a discriminatory effect, even if blacks were unlikely to have been able to control any district previous to the changes, and the Supreme Court summarily affirmed.<sup>281</sup>

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275. *Id.* at 614.

276. *Id.* at 628–31 (Powell, J., dissenting); *id.* at 631–53 (Stevens, J., dissenting).

277. One might suggest two reasons why *Lodge* has so seldom been cited. First, the more highly publicized and more nearly unanimous congressional amendment to Section 2 served the purpose even better. And second, the fact that *Lodge* followed *Bolden* by only two years and did not explicitly overrule it may have made *Lodge* seem a less secure precedent.

278. Motomura, *supra* note 162, at 245.

279. *Wilkes County v. United States*, 450 F. Supp. 1171, 1173 tbl.1 (D.D.C. 1978), *aff'd*, 439 U.S. 999 (1978).

280. *Id.* at 1173–77.

281. *Id.* at 1173–78.

But in a 1983 case, a 6–3 majority of the Supreme Court, in an opinion by Justice Powell, disregarded *Wilkes County* and did not consider intent.<sup>282</sup> Lockhart, Texas, had added two more city commissioners elected to numbered posts to its original two.<sup>283</sup> Under *Beer*, the effect case turned on the trivial question of whether the numbered-post provision continued the earlier system. For nearly sixty years, contrary to Texas law, Lockhart had used numbered posts to elect its commissioners.<sup>284</sup> Following *Wilkes County*, the Carter Justice Department and two of the three District of Columbia District Court judges declared the proper benchmark to be how Lockhart should legally have run its elections, not what it actually did.<sup>285</sup> Assuming that benchmark, Lockhart had retrogressed, and the judges did not have to reach the questions of discriminatory purpose or nonretrogressive discriminatory result. But before the oral argument in the Supreme Court, in November, 1982, the Reagan Justice Department switched sides, joining Lockhart and leaving Mexican-American plaintiffs to fight alone for the former position of the U.S. government.<sup>286</sup> More significantly, when the Mexican-Americans contended that even if there was no retrogression in their position because of Lockhart's actions, the result did discriminate against them and that because of footnote thirty-one, the change should not be precleared, the Justice Department filed a reply brief arguing that Congress had not intended to apply Section 2's results test to Section 5.<sup>287</sup> Justice Powell reversed the district court decision on the benchmark, thereby finding no retrogression,<sup>288</sup> and he "decline[d] to review" the question of whether the 1982 changes had applied Section 2 standards to Section 5 because that question had not been considered in the lower court.<sup>289</sup> Justice Marshall dissented vigorously, citing the evidence from Senate Report 417.<sup>290</sup> The decision left the Section 2–Section 5 connection in a fog.

Nowhere was the fog denser than in the Justice Department. Like the Nixon Administration a decade earlier, the Reagan Administration sought to undermine the VRA, especially Section 5, through guidelines and legal positions espoused in its briefs. But the Administration was inconsistent, evidently reflecting internal differences. Although the Justice Department continued to take the position in other cases in the early 1980s that Section

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282. See *City of Lockhart v. United States*, 460 U.S. 125 (1983).

283. *Id.* at 127–28.

284. *Id.* at 135.

285. See *City of Lockhart v. United States*, 559 F. Supp. 581, 587 (D.D.C. 1981) (holding that allowing the city's discriminatory electoral scheme to escape Section 5 scrutiny "would reward [the city] for its illegal activities in the past"), *vacated*, 460 U.S. 125.

286. See *Lockhart*, 460 U.S. at 130 (noting the change in the Government's litigation posture).

287. Brief for Appellee Cano at 48–50, *Lockhart*, 460 U.S. 125 (No. 81-802); Reply Brief for the United States at 4, *Lockhart*, 460 U.S. 125 (No. 81-802).

288. *Lockhart*, 460 U.S. at 136.

289. *Id.* at 133 n.9.

290. *Id.* at 141, 145–46 (Marshall, J., concurring in part and dissenting in part).

2's results standard did not apply to Section 5, it refused to preclear at least two changes in Mississippi in 1983 on the grounds that they violated the amended Section 2, while in the same year, it precleared a change in Alabama but threatened a Section 2 lawsuit.<sup>291</sup> And it formulated guidelines in 1985 that confused the issue further. Without any case authority or evidence of congressional intent in hearings, reports, or floor discussions, the Department announced that it would only refuse to preclear a law under Section 2's results test if "the party or parties alleging violations" showed by "clear and convincing evidence" that the change had a discriminatory result.<sup>292</sup> This reversed the burden of proof that had always been an integral part of Section 5, it required the involvement of lawyers representing minorities, who played no formal role in Section 5 proceedings and, indeed, were often not participants at all, and it set a particularly high standard (that is, clear and convincing evidence), which had never been a requirement of Section 5.<sup>293</sup> The rationale given by Assistant Attorney General William Bradford Reynolds for Section 2's burden shift was that by itself, Section 2 had always placed the burden of proof upon the party alleging discrimination.<sup>294</sup> If Section 2 was going to be inserted into Section 5, he reasoned, it would bring its burden of proof with it. Moreover, according to the proposed guidelines, only "significant reductions" in minority political strength could be considered retrogressive, and even then, if the jurisdiction could cite a "legitimate governmental goal[]" for its change, the Department would preclear the changes.<sup>295</sup>

Under attack on the issue in the oversight hearings from House Judiciary Subcommittee Chair Don Edwards and his counsel, Reynolds openly doubted that Congress meant Sections 2 and 5 to be connected and floated as an alternative the redundant suggestion that the Department would refuse to preclear changes that a judge had already declared illegal under

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291. Letter from William Bradford Reynolds, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to William H. Ward, Att'y (June 17, 1983), in *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 232, 232–34 (1986); Letter from William Bradford Reynolds, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Thomas P. Lewis, Amite County Chancery Clerk (June 6, 1983), in *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 229, 229–31 (1986); Hancock & Tredway, *supra* note 244, at 420 n.195.

292. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Proposed Revision of Procedures, 50 Fed. Reg. 19,122, 19,131 (proposed May 6, 1985) (to be codified at 28 C.F.R. pt. 51).

293. Another possible, and no less illogical, interpretation of the guideline was that some Justice Department lawyers would be parties, while others in the same office would serve, in effect, as judges.

294. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Proposed Revision of Procedures, 50 Fed. Reg. at 19,131.

295. *Id.*

Section 2.<sup>296</sup> The pressure of the hearings and the subsequent, harshly critical committee report apparently caused the Department, after a much lengthier period of deliberation than its leaders had planned to take, to revise the proposed Section 5 guidelines very substantially, incorporating a results test with no burden shifting and only “clear” evidence required, and eliminating the ability of covered jurisdictions to rationalize their way around the retrogression standard so easily.<sup>297</sup> Although the Department incorporated the revised Section 2 into its standard operating procedures for evaluating Section 5 submissions, it seldom mentioned Section 2 in objection letters, and when it did, it generally also mentioned discriminatory purpose.<sup>298</sup> Nonetheless, the results test remained a part of Section 5 for a decade, and it may have served as a deterrent to antiminority racial gerrymandering during the redistricting of the early 1990s because southern legislators knew that adopting redistricting plans in which minorities had “less opportunity than other members of the electorate to . . . elect representatives of their choice”<sup>299</sup> might invite a Section 5 objection from the Justice Department.

### C. *Redefinition*

The explosion of Section 2 litigation that followed the 1982 anti-*Bolden* amendment first reached the Supreme Court in the 1986 case of *Thornburg v. Gingles*.<sup>300</sup> North Carolina had kept the number of African-American state legislators at a minimum by submerging some black population concentrations in majority-white at-large districts and splitting others between two or more single-member districts.<sup>301</sup> After initially objecting, the Reagan

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296. *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 149–51, 163 (1986) (statement of William Bradford Reynolds, Assistant Att’y Gen., Civil Rights Division, Department of Justice) [hereinafter Reynolds Statement].

297. *See Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. (1986) (providing the testimony of witnesses before the subcommittee); 28 C.F.R. § 51.55 (1987) (mandating that a violation of Section 2 requires the Department to refuse preclearance under Section 5); MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE 26–27 (2001) (recounting the Edwards–Reynolds struggle over Section 5 regulations).

298. *See* Days & Guinier, *supra* note 18, at 170 (summarizing Justice Department procedures required by the 1982 amendments); McCrary et al., *supra* note 154, at 298 tbl.3 (categorizing objection letters in detail); Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in RACE AND REDISTRICTING IN THE 1990S, at 80, 84–87 (Bernard Grofman ed., 1998) (summarizing objection letters).

299. S. REP. NO. 97-417, at 82 (1982) (quoting Section 2 as revised in 1982).

300. 478 U.S. 30 (1986); *see* Hancock & Tredway, *supra* note 244, at 420 n.194 (stating that sixty cases making Section 2 claims were filed in the first three years after Section 2 was amended); Miller & Packman, *supra* note 254, at 16–73 (detailing cases).

301. *See* Gingles v. Edmisten, 590 F. Supp. 345, 349, 349–50 (E.D.N.C. 1984) (outlining the “gravamen of plaintiffs’ claim” that North Carolina submerged African-American voters in large majority-white multimember districts and fractured African-American majorities between legislative districts), *aff’d in part, rev’d in part sub nom.* Thornburg v. Gingles, 478 U.S. 30.

Administration precleared the 1981 plan for the North Carolina state legislature and joined with the state in defending it.<sup>302</sup> Blacks sued and won under the new Section 2's results standard before a three-judge panel<sup>303</sup> whose opinion exhaustively examined each of the seven "Senate factors" from Senate Report 417, which had been drawn from *Regester*.<sup>304</sup> The Supreme Court affirmed the district court's opinion in part, with all nine Justices signing onto opinions that recognized the legitimacy of Section 2's results test and therefore, implicitly, of Congress's rejection of *Bolden*.<sup>305</sup> For a five-person majority, Justice Brennan picked out two of the Senate factors as particularly important—racial bloc voting and regular white victories—and added another consideration that was especially relevant to at-large elections and redistricting but that Congress had not included in the list: the minority group had to show that it could comprise a majority of a "compact" single-member district.<sup>306</sup>

Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, concurred in the judgment that North Carolina's multimember districts discriminated against blacks in violation of the results standard of the amended Section 2, but she criticized Brennan for abridging the Senate factors; for setting out a general formula, rather than requiring a different "intensely local appraisal," in the words of *Regester*,<sup>307</sup> in every case; and for requiring minorities to prove only that they *usually* lost, instead of that their victories were *infrequent*.<sup>308</sup> O'Connor would have made proof of discrimination against minorities much more difficult, granting them a voting rights remedy only if they lost nearly all of the time, as they did in the multimember districts in North Carolina. Brennan's emphasis on black electoral success, O'Connor declared, was tantamount to guaranteeing a right to

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302. For a history of the Justice Department's denial and then preclearance, see *id.* at 350–51. For the Justice Department's participation against the black plaintiffs, see *Gingles*, 478 U.S. at 54–55.

303. See *Gingles*, 590 F. Supp. 345.

304. S. REP. NO. 97-417, at 28–29, 28 & n.113. The Justice Department did reject the State's first congressional plan, not on retrogression grounds but on the basis of allegations that "the decision to exclude Durham County from Congressional District No. 2 [the State's most heavily black district] had the effect of minimizing minority voting strength and was motivated by racial considerations." KOUSSER, *supra* note 16, at 252. After the State drew a plan that was slightly more favorable to African-Americans, the Department precleared it. *Id.* at 252–54. The revised congressional plan was originally part of the *Gingles* lawsuit, but it was dropped before the amended Section 2 was passed. *Id.* at 254.

305. See *Gingles*, 478 U.S. at 34–35; *id.* at 82–83 (White, J., concurring); *id.* at 83–84 (O'Connor, J., concurring in the judgment); *id.* at 106–08 (Stevens, J., concurring in part and dissenting in part).

306. *Id.* at 46 n.12 (majority opinion). Justice White dissented from Brennan's elaborate discussion of racially polarized voting and favored a more-intent-oriented definition drawn from his own opinion in *Whitcomb v. Chavis*, but he concurred in Part I of Brennan's opinion, in which the three-pronged *Gingles* test is set forth. *Id.* at 83 (White, J., concurring).

307. *White v. Regester*, 412 U.S. 755, 769 (1973).

308. *Gingles*, 478 U.S. at 83–105 (O'Connor, J., concurring in the judgment).

proportional representation; she was only willing to safeguard a right to *some* representation.<sup>309</sup>

What O'Connor did not criticize, but which became important in later cases, was the test's vagueness—how was compactness to be measured, and was population, voting-age population, citizen voting-age population, or the number of registered voters to be the index of sufficiently large minority concentrations?<sup>310</sup> Viewed at the time as a great victory for minority rights, Brennan's three-part *Gingles* test simplified VRA cases, allowing the always-poverty-stricken civil rights forces to bring more cases and to pressure numerous local governments to settle out of court.<sup>311</sup> Yet in the longer run, Brennan's ruling that one or (perhaps) more minority groups had to form a majority of a compact district to be eligible for Section 2 relief was employed to undermine minority political power.<sup>312</sup> *Gingles* was also ultimately eroded by the spillover from partisan issues in redistricting. In a case decided the same day as *Gingles*, *Davis v. Bandemer*,<sup>313</sup> the Supreme Court ruled that judges could declare partisan gerrymanders unconstitutional, but Justice White, for a plurality of four, defined violations so vaguely that few, if any, claims could succeed.<sup>314</sup> As a consequence, many party clashes over redistricting were later transformed into racial ones for the purposes of litigation.<sup>315</sup> Both Republicans and Democrats claimed only to be interested in protecting the rights of racial minorities.<sup>316</sup> Those with a taste for irony

309. See *id.* at 94, 99–100.

310. See *Bush v. Vera*, 517 U.S. 952, 959–60 (1996) (plurality opinion) (discussing compactness); *Johnson v. DeGrandy*, 512 U.S. 997, 1021 n.18 (1994) (discussing measures of population equality).

311. GROFMAN, HANDLEY & NIEMI, *supra* note 18, at 61; McDONALD, *supra* note 114, at 181, 185.

312. See *Shaw v. Reno*, 509 U.S. 630, 647, 658 (1993) (suggesting that North Carolina's 1991 redistricting plan disregarded compactness among other so-called traditional districting principles).

313. 478 U.S. 109 (1986).

314. See *id.* at 132 (plurality opinion) (limiting unconstitutional gerrymanders to those in which “the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole”). The classic discussion of *Bandemer* is Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 64 (Bernard Grofman ed., 1990).

315. Compare, e.g., *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992) (rejecting a complaint against *partisan* gerrymandering of North Carolina congressional districts, especially the “serpentine” District 12), *aff'd mem.*, 506 U.S. 801 (1992), with *Shaw v. Hunt*, 517 U.S. 899 (1996) (accepting a complaint against *racial* gerrymandering of District 12). The chief counsel of the Republican National Committee (RNC), Michael A. Hess, was an active counsel in both cases, sitting at the counsel table, for instance, in the remand case of *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899. See *Pope*, 809 F. Supp. at 393 (listing Hess as counsel); see also RACE AND REDISTRICTING IN THE 1990S, *supra* note 298, at x (describing Hess, former chief counsel for the RNC, as a “key player in the redistricting battles of the 1980s and 1990s”). As an expert witness for the NAACP-LDF in *Shaw v. Hunt*, I was in the district courtroom for three days of the six-day trial, where I observed Mr. Hess at the plaintiff's counsel table.

316. North Carolina Democrats defended the ungainly black-majority First and Twelfth Congressional Districts on Section 2, Section 5, and historical racial-discrimination grounds, pointing out that they enabled the elections of the first African-American members of Congress in

found delightful the contortions of a Republican party, so prone to jeremiads against affirmative action, defending maximum racial consciousness in drawing legislative districts.<sup>317</sup>

With the constitutionality of Section 2 unchallenged and the provision given a seemingly simple, objective test in *Gingles*, with the widely disseminated Section 5 guidelines explicitly incorporating Section 2's results test, and with a string of Section 2 victories stretching from the Deep South to Los Angeles, civil rights forces were optimistic as they approached the 1990s round of redistricting.<sup>318</sup> They hoped that Section 2 and Section 5, working in tandem, chiefly as deterrents to discrimination, would expand minority opportunities more than any postcensus redistricting since 1965. They were not disappointed.

#### D. Reward

In 1990, there were 204 black state legislators and only 5 black members of Congress from the eleven southern states that had managed to secede from the Union during the Civil War.<sup>319</sup> After the decennial redistricting of 1991–1992, those numbers skyrocketed to 260 African-American state legislators and 17 members of Congress—the largest two-year increase in the total numbers since southern blacks had first been enfranchised between 1866 and 1868.<sup>320</sup> The increase was the direct and

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ninety-four years from North Carolina, a state that in 1990 was nearly a quarter black. *Shaw v. Hunt*, 517 U.S. at 909–14.

317. See, e.g., CUNNINGHAM, *supra* note 297, at 145 (noting that the Republican Party generally opposed affirmative action but vigorously advocated a minority-candidate “quota system”); Lee Atwater, *Altered States: Redistricting Law and Politics in the 1990s*, 6 J.L. & POL. 661, 668 (1990) (arguing that the Republican Party supports “the enfranchisement of groups deprived of their full representational strength due to historically unfair redistricting plans”). See generally CUNNINGHAM, *supra* note 297, at 104–10 (discussing the extensive Republican efforts to create majority–minority districts).

318. See Davidson, *supra* note 254, at 35 (demonstrating that the U.S. Supreme Court’s dilution test in *Thornburg v. Gingles*, 478 U.S. 30 (1986) was heralded by civil rights attorneys as an important step in eliminating minority-vote dilution); see also *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990) (recognizing a Voting Rights Act violation in a nonsouthern state), *aff’d*, 918 F.2d 763 (9th Cir. 1990).

319. KOUSSER, *supra* note 16, at 19; Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, *supra* note 254, at 335, 341.

320. KOUSSER, *supra* note 16, at 19. The increase in the number of Latino legislators in 1992 was less dramatic in the nine ex-Confederate states because there were insufficient population concentrations outside Florida and Texas to draw majority-Latino districts at the time. See CONGRESSIONAL QUARTERLY, *CONGRESSIONAL DISTRICTS IN THE 1990S: A PORTRAIT OF AMERICA* 19, 47–48, 203, 318, 415, 549, 669, 686, 762 (1993) (tabulating the percentage of Hispanic voting-age persons by congressional district for Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia). In only one district in those nine states did the percentage even reach 8%. *Id.* at 762 (Virginia’s District 8). The proportion of voting-age citizens who were Hispanic would surely be smaller than these figures. Such

indirect result of the VRA. First, the substitution of single-member districts for at-large elections and other changes in electoral structures brought about by lawsuits and preclearance actions enabled a cadre of black politicians to win local and state legislative offices.<sup>321</sup> The 1970s and 1980s, in other words, established minor leagues for black politicians for the first time since the First Reconstruction. Second, the increasing numbers of African-American officeholders in the Democratic party drove whites to the Republicans, and the white flight increased black influence in Democratic primaries and in Democratic delegations in state legislatures that oversaw redistricting.<sup>322</sup> Completing the virtuous circle, as whites became more accustomed to seeing black and brown faces in offices, minority Democratic nominees could often gain enough white support in general elections to beat white Republicans.<sup>323</sup> Third, the number of successful VRA and constitutional lawsuits about redistricting and other facets of the electoral structure convinced more minorities to bring them and more white officeholders to fear them. Those who carried out the redistrictings of the 1990s and the interest-group lawyers and minority politicians who took part in the process or watched it closely had reason to be attuned to possible violations of the VRA.<sup>324</sup> Fourth was the factor that deserved and attracted the most attention. The 1982 VRA amendments, the weapons that *Gingles* placed in minority hands, and the prospect that district lines that were not fair to minorities would not be precleared or would prompt Section 2 litigation combined to produce the huge surge in districts, almost always less than half white in population, that would be carried by minority political candidates in 1992 and afterwards.<sup>325</sup>

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concentrations were obviously too small to use to draw effective Latino districts not only for Congress but also for state legislative seats.

321. See Handley & Grofman, *supra* note 319, at 339–41 (documenting litigation to end multimember districts and explaining how the resulting single-member districts increased minority representation); see also Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, *supra* note 254, at 301, 319–21 (documenting the enormous increase in black representation at the municipal level due to the elimination of multimember districts).

322. In 1991–1992, blacks comprised 15.9% of the Democrats in state legislatures in the eleven ex-Confederate states; in 2001–2002, the legislatures were 29.6% black. These figures were compiled from statistics from COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* (2002); COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* (1992); JOINT CTR. FOR POLITICAL & ECON. STUDIES, *BLACK ELECTED OFFICIALS* (2002); and JOINT CTR. FOR POLITICAL & ECON. STUDIES, *BLACK ELECTED OFFICIALS* (1993).

323. See David L. Epstein & Sharyn O'Halloran, *Trends in Minority Representation, 1974 to 2000*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 61, 66 (David L. Epstein et al. eds., 2006) (attributing improved black electoral results to greater willingness among whites to vote for black candidates).

324. Posner, *supra* note 298, at 94–95.

325. See CUNNINGHAM, *supra* note 297, at 6 (criticizing the Voting Rights Act, as interpreted after *Gingles*, for leading to the clustering of minority voters, thereby increasing the chances of Republicans in nearby districts); Bernard Grofman, *Introduction* to *RACE AND REDISTRICTING IN*



The role of the Justice Department and Section 5 in bringing about the new minority-opportunity districts is controversial.<sup>326</sup> Previous to the 1990s round of redistricting, the Justice Department had been criticized primarily for being too timid in pushing for minority rights and too cozy with local and state officials,<sup>327</sup> and in the 1970s and 1980s, staff attorneys had had to operate within administrations that were unsympathetic to minority concerns in general and minority voting rights in particular.<sup>328</sup> Although it is clear that the Department never espoused a “maximization strategy” during the 1990s, critics, including a prominent panel of federal judges, were outraged that Justice Department employees consulted at all with civil rights interest groups or minority legislators before plans were finalized in the states. According to critics, friendly advice to white state and local government officials was a praiseworthy accommodation to federalism; consorting with the ACLU or the Black Caucus was a conspiracy.<sup>329</sup>

But the sometimes strangely shaped districts that attracted so much attention and scorn were more the product of developments in computer redistricting software and unprecedentedly detailed census and partisan data, which allowed planners to fine-tune district boundaries, than they were of pressure from the Justice Department.<sup>330</sup> Substantively, the new districts

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THE 1990S, *supra* note 298, at 1, 3 (approving of the Voting Rights Act for leading to increased direct representation of minorities).

326. *See, e.g.*, CUNNINGHAM, *supra* note 297, at 6 (criticizing the Justice Department’s enforcement of the Voting Rights Act for serving as a political tool of the Republican Party); Posner, *supra* note 298, at 80–81 (defending the 1990s Justice Department as nonpartisan).

327. *See, e.g.*, BALL ET AL., *supra* note 25, at 202 (complaining in 1982 that an “excessive commitment to negotiated settlements” with local governments drastically reduced the effectiveness of the Voting Rights Act).

328. *See generally* CUNNINGHAM, *supra* note 297, at 16–32 (narrating struggles over the administration of Section 5 from 1965 through the 1980s).

329. *See, e.g.*, Johnson v. Miller, 864 F. Supp. 1354, 1360 (S.D. Ga. 1994) (per curiam) (condemning the “max-black” plan), *aff’d*, 515 U.S. 900 (1995); Posner, *supra* note 298, at 82 (denying that the Justice Department had a “maximization” policy).

330. J. Morgan Kousser, Whatever Happened to *Shaw v. Reno*? 8 (2003) (unpublished manuscript, on file with the Texas Law Review) (citing the use of more precise census-block-level data, new computing hardware, and redistricting software as reasons for the “unusually ungainly districts”). For the 1990 census, the Census Bureau made available unprecedentedly detailed, machine-readable Topologically Integrated Geographic Encoding and Referencing (TIGER) files keyed to redistricting, designed to make geographic integration with other information, such as political data, much easier than ever. For an overview of the data and formats, see U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING, 1990: POPULATION AND HOUSING UNIT COUNTS (1991), available at <http://www2.census.gov/prod2/decennial/documents/D1-D90-STS1-14-TECH.pdf>. Having participated in redistricting in the 1980s and closely studied the processes of redistricting in the 1990s, I am aware of the widely known facts that in the 1980s, redistricting required mainframe computers and mylar map overlays; in the 1990s, everything could be done easily on a desktop computer with convenient, inexpensive software. For a discussion of nonracial reasons for the irregular boundaries in plans at issue in cases from Georgia, North Carolina, and Texas, respectively, see *Miller*, 515 U.S. at 942–43 (Ginsburg, J., dissenting), which notes the nonracial reasons for district irregularities in Georgia; KOUSSER, *supra* note 16, at 265–66, which notes the same in North Carolina; and *id.* at 298–303, which notes the same in Texas.

represented attempts to protect white Democratic incumbents while making way for ambitious black politicians, a transition hastened by the VRA but otherwise similar to other ethnic political transitions. And if minority politicians used all of the tools available, including threats of VRA lawsuits or preclearance battles, to tailor make districts for themselves, well, what could be more typical of American politicians than self-interested action clothed in pious rhetoric?<sup>331</sup> Considering the controversy over *Bolden* in 1982, it is amusing to note that the rationale for possible objections by the Justice Department laid out before redistricting actually got underway, as well as the objection letters on redistricting eventually sent out by the Department, stressed purpose, not results.<sup>332</sup> According to the Department and the public-interest lawyers, it was not necessary to draw a minority-opportunity district whenever it was possible to do so, but it was necessary to justify a choice not to draw one, and pleading incumbent protection or partisan advantage was an insufficient justification if those protected or advantaged were all white.<sup>333</sup>

## V. Redemption

### A. *The Creation of an Era*

C. Vann Woodward was more than anything else the historian of Redemption, the period after Reconstruction in the South. In that era, Woodward believed, a largely new class of hard-capitalist, antipaternalist planters and a rising urban bourgeoisie captured the South from their regional, class, and racial opponents, who had been ascendent during Reconstruction; reshaped it into a “New South”; defended their creation from the Populist threat; and solidified their power for generations through a battery of discriminatory laws that gave them control over social and political life. Before the solidification in law, it was a contradictory, transitional period, with sometimes shifting alliances, sometimes hopeful moments, and sometimes flashes back to the past or forward into the future. Prior to *Origins of the New South*, the scattered studies of the post-Reconstruction period had often romanticized its leaders, gloried in their white-supremacist ideology, indulged their mythology, ignored their faults, and endorsed their

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331. See generally KOUSSER, *supra* note 16, chs. 5–6 (discussing redistricting in North Carolina and Texas in the 1990s).

332. See CUNNINGHAM, *supra* note 297, at 73–76 (recounting the Justice Department’s struggles to define “discriminatory purpose,” as particularly evidenced in statements by Assistant Attorney General for Civil Rights John R. Dunne); McCrary et al., *supra* note 154, at 297–99 (analyzing objection letters); Posner, *supra* note 298, at 97 (“The great majority of the redistricting objections were based on the purpose prong of the Section 5 test.”).

333. The central case cited on this point was *Garza v. County of Los Angeles*. For the evidence used to decide the point in *Garza* and the rationale for its purpose standard, see KOUSSER, *supra* note 16, chs. 2, 7.

final solution. Woodward changed all that, imposing coherence on the period and offering deep criticism of its leaders and its ways.<sup>334</sup>

Although the Second Redemption has not yet found its historian, parallels between it and the First Redemption abound, as I have argued elsewhere.<sup>335</sup> In particular, the role of the Supreme Court in reversing progress toward racial equality and integration was crucial in both periods.

### B. Reaction

It might be thought that the strangest, most ironic page in the story of the VRA was the use of the Fourteenth and Fifteenth Amendments, passed principally to safeguard the rights of African-Americans from racial discrimination, to reverse the march toward political equality of that group and other underrepresented minority groups. But while it might be ironic, it was not unusual in American history for discriminators to fashion tools from the malleable abstractions of the Constitution. Thus Chief Justice Roger Brooke Taney found protection for slavery in the Fifth Amendment's Due Process Clause in *Dred Scott*,<sup>336</sup> Justice Henry Billings Brown discerned "separate but equal" in the Fourteenth Amendment in *Plessy*,<sup>337</sup> and Chief Justice Warren Burger read an intent requirement into the same Fourteenth Amendment, thus ensuring racial isolation in central-city schools, in *Milliken v. Bradley*.<sup>338</sup> When the 5–4 "conservative" majority of the Supreme Court witnessed the ultimate results of the 1982 changes in the VRA—the huge increases in black and brown elected officials after the 1991–1992 redistrictings—and took action to reverse that trend, they were following a well-established judicial pattern.

There were, broadly speaking, four ways by which the "Judicial Redeemers" could have sought to constrain or gut the VRA. First, they could have followed the lead of Justice Thomas in his concurrence in *Holder v. Hall*<sup>339</sup> and declared that the VRA protected the individual right to vote, not any right to be free from discriminatory electoral structures or even that the Fourteenth and Fifteenth Amendments only allowed Congress to protect the

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334. See generally C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877–1913 (1951).

335. KOUSSER, *supra* note 16, ch. 1.

336. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407, 411 (1857) (stating that slave owners' property was protected by the Fifth Amendment), *superseded by constitutional amendments*, U.S. CONST. amends. XIII, XIV.

337. See *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable[] or . . . obnoxious to the [F]ourteenth [A]mendment . . ."), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

338. *Milliken v. Bradley*, 418 U.S. 717, 754–56 (1974). More recently, Chief Justice Roberts has read the Amendment—and *Brown v. Board of Education*!—to prohibit local governments from fostering racial integration in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2767–68 (2007) (plurality opinion) (citing *Brown*, 347 U.S. at 493–94).

339. 512 U.S. 874, 891 (1994).

individual right to vote.<sup>340</sup> This very radical stance would have eliminated *Allen* and everything since, and it would have been met with shock and outrage. Second, at least after *City of Boerne v. Flores*,<sup>341</sup> the Court could have declared one or more sections of the VRA unconstitutional as excessive, inadequately justified exercises of congressional power.<sup>342</sup> Section 5 would then become another casualty of the same five Justices' "federalism revolution," joining the Violence Against Women Act, the Americans With Disabilities Act, and the Fair Labor Standards Act.<sup>343</sup> Third, the Justices might have declared part or all of the VRA unconstitutional by holding that the Fourteenth and Fifteenth Amendments did not allow any state or local government, and the Fifth Amendment did not allow Congress, to take race into account in any governmental decision, even to remedy past discrimination.<sup>344</sup> All of these bright-line, radical decisions would have eliminated the VRA, with the possible exception of allowing the federal government to guard the individual right to vote without discrimination on account of race. Fourth was a much less radical, less publicly visible course, but one subject to congressional reversal: The Court could simply reinterpret Section 5 or any of the other provisions. This course muddled doctrines and strained logic and consistency. The Court chose the fourth course.

### C. *Double, Shifting Standards*

When a challenge to the North Carolina congressional redistricting that had resulted in the election of the first African-American members of Congress from that state during the twentieth century arrived at the Supreme Court in 1993, voting rights supporters had reason for optimism because they had two solid precedents on their side. In 1977, a year after *Beer*, Justice White had produced another of his pragmatic, fact-filled opinions, this one renouncing colorblindness in redistricting and sidestepping the nonretrogression standard because the available census data made it impossible to determine the direction of change in the new districts.<sup>345</sup> Brooklyn, New York, had been covered by Section 5 after the 1970 amendments to the VRA because New York state had had a literacy test for voting and turnout in

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340. See *id.* at 914, 918–21 (Thomas, J., concurring in the judgment) ("Properly understood, the terms 'standard, practice, or procedure' in § 2(a) refer only to practices that affect minority citizens' access to the ballot. Districting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted are simply beyond the purview of the Act.").

341. 521 U.S. 507 (1997).

342. See Richard L. Hasen, *Congressional Power to Renew Preclearance Provisions*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 323, at 81, 85–88 (discussing implications of *City of Boerne v. Flores* for the VRA).

343. See *infra* subpart VI(A).

344. Justice Clarence Thomas asserted this to be the correct constitutional theory in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2770–71 (2007) (Thomas, J., concurring).

345. See *United Jewish Orgs. of Williamsburgh v. Carey*, 430 U.S. 144, 147–68 (1977).

Kings and two other counties had been less than 50% in the 1968 election.<sup>346</sup> The Justice Department objected to a 1972 state legislative plan for Brooklyn that created several senate and assembly districts that were over 80% nonwhite.<sup>347</sup> To unpack the black and Puerto Rican population, the legislators decided to split areas heavily populated by Hasidic Jews, who had previously controlled their own senate and assembly districts.<sup>348</sup> Speaking to someone from the Voting Section of the Justice Department, a New York state legislative staffer “got the feeling” that if the new districts were designed to be about 65% nonwhite, the Department would preclear them.<sup>349</sup> New York drew such districts, and the Department precleared them.<sup>350</sup>

Leaders of the Hasidic community sued, but a three-judge district court dismissed the suit and the Second Circuit Court of Appeals affirmed, ruling that the plaintiffs had suffered no injury because even with the unpacked nonwhite districts, whites would likely enjoy more than proportional representation in Kings County.<sup>351</sup> The Supreme Court affirmed, finding implicit in the *Beer* and *City of Richmond* opinions that states and localities could legally use racial data in the drawing of districts, even for nonremedial purposes, and that they could establish a target number of seats as minority-opportunity districts, as they would have to so as not to retrogress if there were any such existing districts.<sup>352</sup> Additionally, New York state had no discriminatory purpose, for all the legislature was trying to do was to comply with the requirements of Section 5, and this was a sufficient interest to satisfy the U.S. Constitution.<sup>353</sup> The state could “deliberately use[] race in a purposeful manner” so long as “its plan represented no racial slur or stigma.”<sup>354</sup>

Six weeks before the oral argument in the North Carolina case, the Supreme Court unanimously held that even though the majority-Republican Ohio Apportionment Board had misinterpreted Section 2 of the VRA to require that it maximize the number of majority-black districts and increase the black percentage in every district currently represented by an African-American, its desire to comply with federal law “does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy

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346. *Id.* at 148.

347. *See id.* at 152, 151–52 (stating that the legislature decreased the two largest nonwhite majorities to below 90% “to overcome Justice Department objections”).

348. *Id.* at 152.

349. *Id.*

350. *Id.*

351. *United Jewish Orgs. of Williamsburgh v. Wilson*, 510 F.2d 512, 523 & n.21 (2d Cir. 1975), *aff’d sub nom. United Jewish Orgs. of Williamsburgh v. Carey*, 430 U.S. 144.

352. *United Jewish Orgs.*, 430 U.S. at 161–62.

353. *Id.* at 165.

354. *Id.*

Clause of the United States Constitution.”<sup>355</sup> In her opinion of the Court, Justice O’Connor, the former Republican state senate majority leader in Arizona, dismissed the facts that packing blacks into fewer districts made it easier to elect Republicans in surrounding districts and decreased the total number of districts that blacks could win or influence,<sup>356</sup> although both facts had been much stressed in the district court’s opinion.<sup>357</sup> And she treated the endorsement of the maximization plan by some black interest groups as strong evidence that the plan had no discriminatory intent.<sup>358</sup> The endorsement of compliance with the VRA as a shield for race-conscious redistricting strengthened the *United Jewish Organizations*<sup>359</sup> (*UJO*) precedent on the eve of the Court’s consideration of the central *Shaw v. Reno*<sup>360</sup> case.<sup>361</sup>

After the Justice Department refused to preclear North Carolina’s plan for the boundaries of twelve congressional districts, only one of which was majority black, the Democrats who controlled the legislature snipped out a second district, also 54% African-American in voter registration, carefully tailoring it to try to preserve the districts of as many white Democratic incumbents as possible.<sup>362</sup> The Department of Justice approved.<sup>363</sup> Republicans then filed a partisan-gerrymandering suit, and when that was dismissed,<sup>364</sup> they backed a “racial gerrymandering” claim filed on behalf of five whites by a Duke University Law School professor.<sup>365</sup> The district court relied almost wholly on *UJO*, dismissing the plaintiffs’ discriminatory-purpose claim on the grounds that *UJO* expressly ruled that race-conscious redistricting was constitutional, especially when undertaken to comply with the VRA, and the discriminatory-effect claim because even if blacks won the

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355. *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993).

356. *See id.* at 157–59.

357. *See Quilter v. Voinovich*, 794 F. Supp. 695, 698 (N.D. Ohio 1992) (explaining the mechanisms by which the Ohio voter-apportionment plan reduced the cumulative strength of minority voters), *rev’d* 507 U.S. 146.

358. *Quilter*, 507 U.S. at 160. The only common thread in Justice O’Connor’s opinions in *Quilter* and *Georgia v. Ashcroft* was that both plans were intensely partisan. In *Quilter*, O’Connor disdained “influence” or “coalition” districts—those that candidates preferred by minorities could win even where whites comprised a majority of voters. *Id.* at 154. In *Ashcroft*, she celebrated such districts. *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). In *Quilter*, the fact that all black leaders in the legislature opposed the plan and stood to lose power because the redistricting would cost the Democrats seats did nothing to undermine the Republican reapportionment; in *Ashcroft*, black endorsement of the Georgia Democratic plan and the connection between white Democratic seats and black power in the legislature legitimized the Democratic plan. *See infra* subpart V(E).

359. *United Jewish Orgs.*, 430 U.S. at 144.

360. 509 U.S. 630 (1993).

361. KOUSSER, *supra* note 16, at 431–34.

362. *See id.* at 243–44, 263–66, 269 (recounting events in the 1991–1992 redistricting).

363. *Shaw v. Reno*, 509 U.S. at 636.

364. *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992), *aff’d mem.*, 506 U.S. 801 (1992).

365. *Shaw v. Reno*, 509 U.S. at 636–37.

two seats, whites would still be overrepresented in the congressional delegation.<sup>366</sup>

The Supreme Court reversed, 5–4, in an opinion by Justice O’Connor, joined by the other members of the consistent majority in voting rights cases of the 1990s, Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas.<sup>367</sup> To circumvent the fact that the plaintiffs had suffered no personal or group injury and should, by the Court’s precedents,<sup>368</sup> therefore have been denied standing to sue,<sup>369</sup> O’Connor invented “a new cause of action,” one for racial classification in redistricting.<sup>370</sup> Disguising the fact that the districts were the most integrated in the state’s history and more racially balanced than many she had casually approved in *Quilter* by referring to them as “segregat[ed]”<sup>371</sup> and resembling “political apartheid”<sup>372</sup> and by never mentioning their racial admixtures explicitly, O’Connor ruled that because their designers took race into account in drawing them, the districts were subject to strict scrutiny, which required that they be justified by one or more compelling state interests.<sup>373</sup>

In a tinny echo of *Gingles*, North Carolina’s voting rights case of the previous decade, O’Connor announced that if the districts had been more compact and followed other “traditional districting principles,” the majority-black districts might not have called so much attention to themselves and might consequently not have been considered racial classifications.<sup>374</sup> The Justice provided no evidence that such principles had been followed in the past, and in North Carolina and many other states, they manifestly had not been.<sup>375</sup> Remanding the case to the district court for evidence of why the state had acted and inquiry about whether the justifications were compelling,<sup>376</sup> O’Connor suggested that Section 5 could not be a compelling state interest here because it only protected against retrogression. Ignoring

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366. *Shaw v. Barr*, 808 F. Supp. 461, 470–73 (E.D.N.C. 1992), *rev’d sub nom. Shaw v. Reno*, 509 U.S. 630; *see also* KOUSSER, *supra* note 16, at 379–83 (discussing *Shaw v. Barr*).

367. *Shaw v. Reno*, 509 U.S. at 632.

368. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) (holding that members of an environmental group lacked standing to challenge Interior Department action under the Endangered Species Act because they raised “only a generally available grievance about government—claiming only harm to [their] and every citizen’s interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large”).

369. *Shaw v. Reno*, 509 U.S. at 642.

370. *Id.* at 679, 679–80 (Souter, J., dissenting).

371. *Id.* at 652 (majority opinion).

372. *Id.* at 647.

373. *Id.* at 653–54.

374. *Id.* at 647, 646–47.

375. *See generally* KOUSSER, *supra* note 16, chs. 5–6. Chapter 5 originated in a short history of racial redistricting in North Carolina for the case of *Shaw v. Hunt*, 517 U.S. 899 (1996) and was cited in the Supreme Court’s opinion at page 910.

376. *Shaw v. Reno*, 509 U.S. at 658.

the purpose prong of Section 5 entirely, the Justice also failed to consider the Section 2–Section 5 connection, which had been inscribed in the Justice Department guidelines since 1987. Although she did not say so explicitly, O'Connor implied that the Justice Department could not refuse to preclear any nonretrogressive plan and that any covered jurisdiction that created a new minority-opportunity district could not justify its decision by a desire to comply with Section 5.<sup>377</sup> This called into question the actions of the Justice Department and nearly every southern state legislature in the 1991–1992 redistricting, undermined numerous court decisions, and reined in Section 5 considerably further than Justice Stewart had ever contemplated, all with a minimum of legal reasoning or explicit renunciation of the apparently abandoned policies. The *Shaw* revolution was strangely inarticulate.

The vivid rhetoric of O'Connor's peroration in *Shaw v. Reno* suggests either alarming naïveté or deliberate sarcasm. Overturning almost perfectly racially balanced districts that integrated the state's congressional delegation for the first time since 1900, drawn by the first North Carolina legislature to take equality in election laws seriously since the violent “white supremacy campaign” of 1898, O'Connor concluded:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin . . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.<sup>378</sup>

Rather than overruling *UJO*, O'Connor's opinion distinguished it on the ground that the districts at issue in *UJO* were compact, rather than being obviously based on racial geography.<sup>379</sup> *Miller v. Johnson*,<sup>380</sup> a much more radical decision than *Shaw*, explicitly overruled *UJO* on two points, holding

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377. See *id.* at 655, 654–55 (“A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.”). States could attempt to justify new minority-opportunity districts on the basis of Section 2 alone or on the contention that they were trying to remedy past discrimination, and North Carolina provided considerable evidence for these contentions on remand in *Shaw v. Reno*, including quite-specific evidence of racial discrimination in congressional redistricting in the 1970s and 1980s. See KOUSSER, *supra* note 16, at 269 (outlining the North Carolina legislature's reasons for adopting new districts in 1991). But in 1991–1992, according to Justice Department guidelines, Section 5 and Section 2 standards overlapped, so a Section 2 contention was not entirely independent, and past discrimination was easily brushed aside on the grounds that the legislature did not know about it. See *Shaw v. Hunt*, 517 U.S. at 910 (“[T]here is little to suggest that the legislature considered the historical events and social-science data that the reports [of past discrimination] recount, beyond what individual members may have recalled from personal experience.”).

378. *Shaw v. Reno*, 509 U.S. at 657.

379. *Id.* at 651–52.

380. 515 U.S. 900 (1995).



that assigning *any* “significant number of voters”<sup>381</sup> to *any* district of *any* shape whatsoever<sup>382</sup> on the basis of race was always subject to strict scrutiny<sup>383</sup> and that a covered jurisdiction could use its obligation to comply with Section 5 as a justification for considering race in redistricting only to preserve the racial status quo.<sup>384</sup> Justice Kennedy’s majority opinion reasoned that Section 5 banned only retrogression, and therefore, a jurisdiction could not have a discriminatory purpose under Section 5 in choosing to reject a proposal for a majority–minority district unless the total number of such districts was less than that in its previous plan.<sup>385</sup> To establish a new minority-opportunity district, the state had to show a compelling interest, Kennedy declared, but to refuse to establish one, the state need only show a desire to adhere to any “other districting principles,” principles that he did not define, enumerate, or limit.<sup>386</sup>

Adopting the angry tone of the district court in the case, Kennedy castigated the Justice Department’s interpretation of the constitutional purpose standard in *Beer*, characterizing the Department’s policy as one of maximization of the number of minority-opportunity districts.<sup>387</sup> As in *Shaw*, Kennedy seemed to indicate that the Department could not object on the grounds of purpose or effect to any nonretrogressive redistricting plan or electoral structure. According to Kennedy, this was Congress’s intent, and if Congress intended more, it might violate the Fourteenth Amendment.<sup>388</sup> Why the Fourteenth Amendment, which did not mention *retrogression*, or, indeed, race, allowed race-conscious electoral laws or districts to preserve the racial status quo, no more and no less, Kennedy did not explain. To Kennedy, equal protection seemed to amount to protection equal to that previously enjoyed. On this reading, the thirty-ninth Congress, which adopted the Fourteenth Amendment in 1866, must have wished to preserve the infamous southern Black Codes, which consigned African-Americans to near slavery; no court or Congress after 1910 could have reversed black disfranchisement; and all the NAACP Legal Defense Fund could have hoped for from *Brown v. Board of Education* in 1954 was to preserve segregation in the separate and very unequal form in which it then existed. It was a curious constitutional stance for the Judicial Redeemers to take, committed as several of them claimed to be to original intent or strict fidelity to the text.

Considered alongside *Quilter*, *Miller* also provided a parallel with the partisanship that motivated the First Redemption. When Ohio Republicans

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381. *Id.* at 916.

382. *Id.* at 915.

383. *Id.* at 904.

384. *Id.* at 925–26.

385. *Id.* at 923–24.

386. *Id.* at 924.

387. *Id.* at 924–25.

388. *Id.* at 926–27.

openly advertised their desire to maximize the number of majority-minority districts, blatantly misinterpreting Section 2 in order to do so, O'Connor did not apply strict scrutiny, and she praised the Ohio Apportionment Board for seeking to comply with federal law, however misguided its interpretation. When Georgia Democrats, in the same round of redistricting, agreed under Justice Department pressure to draw three majority-black districts, Kennedy applied a level of scrutiny that made Georgia's case hopeless, and he derided the state's legislature for acceding to what he considered a maximization interpretation of Section 5. Approval by pro-black interest groups legitimized the Ohio plan but fatally tainted the Georgia arrangement. "Maximization" attracted praise from the Judicial Redeemers when it came from the North, but blame when it originated in the South. The treatment of the VRA in these two cases was separate and unequal not only by race, but also by party and region.

#### *D. Retrogression to Retrogression*

*Shaw* and *Miller* had rather vaguely constrained Section 5, seeming to limit both its effect and purpose prongs to retrogressive actions. Two cases from Bossier Parish, Louisiana, gave the Judicial Redeemers an opportunity to make that standard more explicit and to spell out the reasoning behind it. Their performances were not models of judicial craftsmanship.

In *Reno v. Bossier Parish*,<sup>389</sup> Justice O'Connor, for a seven-person majority, the usual five plus Justices Breyer and Ginsburg, rejected the connection between Sections 2 and 5 by distorting precedents, ignoring the shaky basis of *Beer*, disparaging the Justice Department's interpretation of its own duties, sneeringly denigrating the authority of congressional reports, and ignoring other evidence of congressional intent. Citing only *Beer* and *City of Lockhart*, O'Connor asserted that to allow a Section 2 violation to prompt a refusal to preclear a law under Section 5 would call into question "20 years of precedent."<sup>390</sup> But *Beer* rested on a misrepresentation of one congressional report and what must be assumed to be a deliberate avoidance of contrary information in another,<sup>391</sup> and *Lockhart* explicitly reserved the question of the connection between Sections 2 and 5.<sup>392</sup> O'Connor also treated *Bolden* as overturning *Regester*,<sup>393</sup> though Stewart claimed not to be doing so,<sup>394</sup> and not only did *Rogers v. Lodge* treat *Regester* as a viable

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389. *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471 (1997).

390. *Id.* at 480.

391. See *supra* text accompanying notes 159–61.

392. *City of Lockhart v. United States*, 460 U.S. 125, 133 n.9 (1983).

393. See *Bossier I*, 520 U.S. at 483 (asserting that after *Bolden*, "White ceased to represent the current understanding of the Constitution . . .").

394. See *City of Mobile v. Bolden*, 446 U.S. 55, 69 (1980) (plurality opinion) (claiming that *White v. Regester* indicated that "only a purposeful dilution of the plaintiffs' vote would offend the Equal Protection Clause"). In dissent, Justice Byron White, the author of *White v. Regester*, noted

interpretation of the Constitution and place it within the stream of intent decisions,<sup>395</sup> but O'Connor signed onto Justice White's opinion in *Lodge*,<sup>396</sup> her first voting rights case as a Justice. In *Bossier I*, she did not repudiate *Lodge*, apparently desiring to wipe out precedents one case at a time.<sup>397</sup>

Although recognizing that the Court usually deferred to Justice Department interpretations of the VRA, O'Connor made an exception in this case because she thought congressional intentions not to mix standards for Section 2 into those of Section 5 were clear. Congress in 1982 made no change in the text of Section 5, but merely "drop[ped] a footnote,"<sup>398</sup> the Justice remarked dismissively. The House Report on the same subject, she reinterpreted.<sup>399</sup> The House oversight hearings and report,<sup>400</sup> she derided.<sup>401</sup> The Kennedy and Sensenbrenner floor remarks, she ignored. Turning to the question of discriminatory purpose, Justice O'Connor made more explicit and extreme Justice Kennedy's judgment in *Miller* that there could be no

that Justice Stewart's *Bolden* plurality opinion did not "question[] the vitality of *White v. Regester*." *Id.* at 94 (White, J., dissenting).

395. See *Rogers v. Lodge*, 458 U.S. 613, 619 (1982) (noting that *White v. Regester* is consistent with "the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment").

396. *Id.* at 613.

397. Justice O'Connor was the apparent heroine and inspiration for Cass Sunstein's *ONE CASE AT A TIME* (1999).

398. *Bossier I*, 520 U.S. at 484.

399. Compare *id.* (interpreting the House Report's discussion of Sections 2 and 5 as indicating that they were exclusive, rather than overlapping grounds for objections), with *id.* at 506 (Stevens, J., dissenting in part and concurring in part) (asserting that the House Report demonstrates an intent to evaluate violations of Sections 2 and 5 under the same substantive standard).

400. See generally, e.g., *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 44–56 (1986) (statement of Laughlin McDonald, American Civil Liberties Union Foundation, Southern Regional Office); *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 100 (1986) (statement of Judith Sanders-Castro, Att'y, Mexican American Legal Defense and Educational Fund); Reynolds Statement, *supra* note 296, at 163; *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 168–70 (1986) (statement of Frank R. Parker, Joint Center for Political Studies); Post-Trial Brief for the United States of America, *County Council v. United States*, 555 F. Supp. 694 (D.D.C. 1983) (No. 82-0912), in *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 172, 172–87 (1986).

401. See *Bossier I*, 520 U.S. at 484–85 (declining to give controlling weight to statements made in the oversight hearings and the subsequent 1986 House Report because such sources, as part of the postenactment legislative record, were the views of a subsequent Congress and therefore "form[ed] a hazardous basis for inferring the intent of an earlier one"). However, Justice O'Connor's criticism neglected the fact that *Beer* was based on a similar report, a 1975 House Report on the 1965 text of the VRA. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (citing H.R. REP. NO. 94-196, at 60 (1975) to buttress the argument that Section 5 sets up a nonretrogression standard for voting-procedure changes). Both the 1975 and 1982 reports, like the 1986 report, were postenactment legislative records.

discriminatory purpose under Section 5 in choosing not to draw a minority-opportunity district. O'Connor declared that jurisdictions could reject minority-opportunity districts, as did the Bossier Parish School Board, which had been fighting to preserve segregated schools since 1954, not only to preserve "traditional districting principles" but also for "no reason at all."<sup>402</sup>

One question that Justice O'Connor left open for consideration by the district court on remand was whether Justice Stewart had meant the retrogression test to apply to purpose, as well.<sup>403</sup> On this point, Justices Breyer and Ginsburg left her.<sup>404</sup> Because the Justice Department had rarely used violations of Section 2, standing alone, to refuse preclearance, but it had increasingly employed what it and virtually all commentators believed to be *Beer's* nonretrogressive, but still-discriminatory, purpose standard,<sup>405</sup> the possible redefinition of purpose under Section 5 posed a much graver threat to the protection of minority rights than did the disentangling of Section 2 from Section 5. Thus, although intellectually indefensible, Justice O'Connor's decision in *Bossier I* was not terribly damaging to the substance of minority rights.

In *Bossier II*,<sup>406</sup> Justice Scalia completed the job of interpreting away Section 5 that Justice Stewart had started in *Beer*, Congress and the Justice Department had delayed until *Shaw*, and the Redeemers had been pursuing from that case forward. A majority of the U.S. District Court for the District of Columbia, on remand, had found that the school board had not adopted its electoral boundary lines with a discriminatory purpose, retrogressive or nonretrogressive,<sup>407</sup> thus forcing the Supreme Court to answer its own question without any assistance from below. For the usual five Justices, Justice Scalia obliged, reading Section 5's purpose language to prohibit only retrogressive purpose. The logic of his argument focused on three points. First, Section 5 addressed only changes, and the necessary benchmark for changes is the status quo. Therefore, unlike the Fifteenth Amendment, which uses the same *denying or abridging* phraseology<sup>408</sup> but applies not just to *changes* in laws but to *all* voting laws, Section 5 is concerned only with

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402. *Bossier I*, 520 U.S. at 488.

403. *Id.* at 486.

404. *Id.* at 493 (Breyer, J., concurring in part and concurring in judgment).

405. See, e.g., Peyton McCrary et al., *The Law of Preclearance: Enforcing Section 5*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 323, at 20, 26–27 (counting legal grounds cited in objection letters); Posner, *supra* note 298, at 84 (describing Justice Department policy).

406. *Reno v. Bossier Parish School Board (Bossier II)*, 528 U.S. 320 (2000), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. § 1973c).

407. *Bossier Parish Sch. Bd. v. Reno*, 7 F. Supp. 2d 29, 32 (D.D.C. 1998), *aff'd*, 528 U.S. 320, *superseded by statute*, Voting Rights Act Reauthorization and Amendments Act of 2006 sec. 5, § 5.

408. *Bossier II*, 528 U.S. at 324; see also U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be *denied or abridged* by the United States or by any State on account of race, color, or previous condition of servitude." (emphasis added)).

“backsliding.”<sup>409</sup> Second, the language of purpose and effect was parallel in Section 5 (“does not have the purpose and will not have the effect of denying or abridging”<sup>410</sup>), and if the majority opinion in *Beer* virtually inserted *retrogressive* before *effect*, then consistency demanded that later Justices also insert *retrogressive* before *purpose*.<sup>411</sup> Third, because the Court has never held that the Fifteenth Amendment prohibits vote dilution<sup>412</sup> and the Fifteenth Amendment is the constitutional basis of the VRA, interpreting Section 5 to prohibit dilution risks having it declared unconstitutional.<sup>413</sup>

As Justice Scalia’s denunciation in *Bossier II* of “a raw interpretation of the statute”<sup>414</sup> suggests, these are peculiar arguments for a self-proclaimed textualist.<sup>415</sup> The first argument fails because the language of Section 5 does not say “abridging *more* than the right is currently abridged,” but simply “abridging.”<sup>416</sup> A discriminatory law that replaced a former discriminatory law would still, itself, abridge, as *Bossier Parish*’s 1992 apportionment plan did. The second argument is inadequate because it takes for granted that it is correct to insert *retrogressive* before *effect*, regardless of the fact that *retrogressive* does not actually appear there. The third assumes that the VRA rests only on the Fifteenth Amendment, but as we have seen, Justices have often treated it as founded on the Fourteenth, as well,<sup>417</sup> and the dilution standards of *Regester*, a Fourteenth Amendment case, were adopted by Congress in 1982 for Section 2 of the VRA.<sup>418</sup> Clearly, neither the Court nor Congress has been consistent about the constitutional basis of the VRA. Unless the Court is willing to overturn *Gingles* and all subsequent Section 2 vote-dilution cases, that section of the VRA prohibits vote dilution, so why not Section 5, with its almost identical language, as well?

Justice Scalia’s efforts to distinguish previous cases that contradicted his retrogressive-intent standard were no more convincing. In *City of*

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409. *Bossier II*, 528 U.S. at 335, 335–36.

410. 42 U.S.C. § 1973c(a) (1965) (amended 2006).

411. *Bossier II*, 528 U.S. at 330–32. As discussed *infra* note 543 and accompanying text, Congress in 2006 changed *and* in this phrase to *or* specifically to overturn *Bossier II*.

412. *Bossier II*, 528 U.S. at 334 n.3.

413. *See id.* at 336 (suggesting that such an interpretation would create “substantial” federalism costs, “perhaps to the extent of raising concerns about § 5’s constitutionality”).

414. *Id.* at 336 n.5.

415. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–25 (1997) (expounding his views on textualism); *see also* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 80–81, 178–79, 183–84 (1996) (arguing that Justice Scalia’s strict textualism often causes him to break ranks with other judicial conservatives).

416. 42 U.S.C.A. § 1973c (West 2003 & Supp. 2007).

417. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 177 n.13 (1980) (noting that Justice Douglas treated the VRA as constitutionally justified by Section Five of the Fourteenth Amendment).

418. *See supra* text accompanying notes 269–70.

*Richmond v. United States*,<sup>419</sup> five members of the Supreme Court allowed Richmond, Virginia, to annex areas that reduced the black percentage of the population from 52% to 42%, but only after the Justice Department refused to preclear the annexation unless Richmond switched from an at-large to a single-member-district system of election in which African-Americans could expect to elect four of the nine council members, even though they comprised only 37% of the voting-age population and only if it could be convincingly shown that the city had no discriminatory purpose.<sup>420</sup> In his discussion of *Richmond*, Justice Scalia neglected to mention the switch to single-member districts, which considerably offset the discriminatory effect, and he asserted that Justice White, who wrote the opinion of the Court in *Richmond*, meant discriminatory purpose to denote only retrogressive discriminatory purpose,<sup>421</sup> when White made no such distinction. Apparently realizing the weakness of his arguments, Scalia tried to limit *Richmond* to the topic of annexation,<sup>422</sup> despite the fact that White had specifically *not* limited it, stating, “An official action, whether an annexation *or otherwise*, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.”<sup>423</sup>

Likewise, Justice Scalia tried to explain away Justice Stewart’s statement in *Beer* that even an ameliorative change could be objected to if “the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution”<sup>424</sup> by suggesting that it referred to an outright denial of the vote, not an abridgement.<sup>425</sup> But the only way an *apportionment* could deny the vote would be to exclude minorities from *every* district, which is absurd. Again appearing to admit his own illogic, Scalia dismissed the constitutional exception to retrogression in *Beer* as “dictum,” unnecessary to the decision in the case,<sup>426</sup> even though the Justice Department had made it the prime justification for objections for two decades without complaint from the judiciary.<sup>427</sup>

419. 422 U.S. 358 (1975).

420. *Id.* at 366–72. The Justice Department was simply following black activists in Richmond, who had opposed city–county consolidation and annexation since 1961 unless the city shifted from at-large to single-member-district elections. The activists sued to reverse the annexations in 1971. MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 281, 283–84 (2005).

421. *City of Richmond*, 422 U.S. at 378. Note that White dissented in *Beer*, the year after *City of Richmond* was decided. See *Beer v. United States*, 425 U.S. 130, 143–67 (1976) (White, J., dissenting).

422. *Reno v. Bossier Parish School Board (Bossier II)*, 528 U.S. 320, 330–31 (2000), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. § 1973c).

423. *City of Richmond*, 422 U.S. at 378 (emphasis added).

424. *Beer*, 425 U.S. at 141.

425. *Bossier II*, 528 U.S. at 337–38.

426. *Id.* at 338.

427. McCrary et al., *supra* note 154, at 297.

Justice Scalia compounded the absurdity in his discussion of *Pleasant Grove v. United States*.<sup>428</sup> In *Pleasant Grove*, the Justice Department used Section 5 to prevent a town with no black voters from annexing all-white areas because the Department believed the town's attempt to remain lily-white was discriminatory.<sup>429</sup> Revisiting *Pleasant Grove* in *Bossier II*, Scalia not only disregarded the fact that the six-member *Pleasant Grove* majority—including himself!—rejected the three-person minority's embrace of the concept of retrogressive intent, but he also invented the self-contradictory concept of future retrogression. Because the town had no black voters at the time, its actions could not have had a retrogressive purpose. But, he speculated, the town fathers could have been planning to preempt the effect of any future intrusions of blacks by annexing areas *now* that could be expected to fill up with whites *after* the blacks moved in, thus causing a retrogression in African-American political power at some unstated time in the future.<sup>430</sup>

As if to taunt proponents of a vigorous Section 5, Justice Scalia announced three times in *Bossier II* that the Justice Department and the District of Columbia District Court had an obligation to preclear unconstitutionally discriminatory, but nonretrogressive changes in laws.<sup>431</sup> The purpose prong of Section 5, Scalia exulted, had been reduced to “the ability to reach malevolent incompetence,” the actions of a governmental body that tried to impose a retrogressive change but failed to injure minorities.<sup>432</sup> By that definition, the Judicial Redeemers could certainly not be charged with a discriminatory purpose, as they had manifestly succeeded in their goal of severely undermining the protections for minority political rights.<sup>433</sup>

#### E. O'Connor's Influence

Having divorced Sections 2 and 5 in *Bossier I*, Justice O'Connor rejoined them, in a rather less formal living arrangement, in *Georgia v. Ashcroft*.<sup>434</sup> Seeking to preserve Democratic control in the Georgia state senate, Democratic legislators, led by African-Americans, reduced the black percentages of some overwhelmingly black districts, slightly increasing the overall number of districts that black Democrats could carry, as long as they

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428. 479 U.S. 462 (1987).

429. *Id.* at 466 & n.5.

430. See *Bossier II*, 528 U.S. at 340 (reading *Pleasant Grove* to hold “that a jurisdiction with no minority voters can have a retrogressive purpose, at the present time, by intending to worsen the voting strength of *future* minority voters”).

431. *Id.* at 332, 335, 339.

432. *Id.* at 332.

433. The Bush Justice Department quickly rewrote its guidelines to state that “[r]edistricting plans that are not retrogressive in purpose or effect must be precleared, even if they violate other provisions of the Voting Rights Act or the Constitution.” Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5412 (Jan. 18, 2001).

434. 539 U.S. 461 (2003).

got enough white “crossover” votes.<sup>435</sup> The arrangement also raised the number of black influence districts, those where white Democrats sympathetic to most black concerns could win if they received enough African-American support. The Justice Department believed that the black percentages in three districts had been reduced too far for black candidates to be able to carry them in the always racially polarized elections.<sup>436</sup> Republicans, who wanted blacks to be packed into fewer districts so that their party could win more seats, intervened in the name of several black individuals.<sup>437</sup> The legal issues were whether Section 5 allowed such tradeoffs to satisfy a retrogressive-effect standard, and if so, how the various kinds of districts were to be weighed to determine whether the tradeoffs brought the balance of minority power to at least the level before the redistricting.<sup>438</sup>

Speaking for her usual 5–4 majority, Justice O’Connor reinvigorated Section 5 by blessing the tradeoffs, proposing that the balance be evaluated by considering the totality of the circumstances, a Section 2 standard, and repeatedly citing her own opinion in *Gingles*, a Section 2 case, as a guide.<sup>439</sup> Among the circumstances she listed were the number of blacks elected, the degree of racial polarization in elections, the power of black leaders in the legislature, the extent to which they endorsed the plan, and the Democratic percentage of the voters and the responsiveness to black interests of whites elected from districts containing significant numbers of African-Americans.<sup>440</sup> Surprisingly, Justice O’Connor explicitly introduced partisanship into her analysis when she recognized that blacks were likely to be able to exert influence only on Democratic legislators. In particular, she noted approvingly that in thirty-three of the thirty-four state senate districts in which blacks constituted over 20% of the voting-age population, a majority of the voters were Democrats, treating this as a sign that black votes would be influential in the outcomes because Democrats were the likely winners.<sup>441</sup> Stressing the race-conscious placement of blacks into influence, coalition, and majority-black districts throughout her opinion, Justice O’Connor made no reference in that part of her opinion to *Miller v. Johnson*, the 1995 case about Georgia congressional districts, nor did she try to reconcile her approach with *Miller*’s requirement of strict scrutiny any time any minority voters were placed in any districts or *Miller*’s constitutional bar to drawing a

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435. *Id.* at 469. A voter who crosses over the racial line to vote for a candidate of a different race is referred to as a crossover voter.

436. Brief for the Federal Appellees at 5–9, *Ashcroft*, 539 U.S. 461 (No. 02-182).

437. *Ashcroft*, 539 U.S. at 470–74.

438. *Id.* at 479–84.

439. *Id.* at 479–80. Justice O’Connor did not cite the plurality opinion by Brennan in *Gingles*, raising the question of whether it is still considered good law.

440. *Id.* at 485–90.

441. *Id.* at 489.



district for a predominantly racial reason.<sup>442</sup> These omissions raised Justice Kennedy's ire sufficiently that he mentioned them in a concurrence, decried the necessary race consciousness of the Section 5 process, and implied that if any of the legal parties had used *Miller* to attack the constitutionality of Section 5, the votes in *Ashcroft* might well have been different.<sup>443</sup>

Reaction to *Ashcroft* in the voting rights community split. Pessimists joined Justice Souter, who wrote the dissent for his three colleagues in the case,<sup>444</sup> believing that *Ashcroft*'s amorphous standards were unworkable, at least in the sixty-day period of review that the Justice Department lawyers and paralegals had to evaluate Section 5 submissions from covered jurisdictions.<sup>445</sup> More important, they feared that *Ashcroft* would weaken the retrogression standard, allowing states and localities to make any changes they wished so long as their leaders could rationalize the alteration as somehow increasing black political potency.<sup>446</sup> For instance, single-member districts could be switched to at-large on the argument that blacks would then influence the election of more officials.<sup>447</sup> Optimists, on the other hand, declared that *Ashcroft* strengthened Section 5 by bringing in Section 2's dilution standards and making the concept of minority political power more realistic.<sup>448</sup> Eliminating the 50% bright line meant that in places and times where there was little white crossover voting, minority voting strength would have to be concentrated, while in times and places in which larger

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442. After discussing *Miller* in the history section of her opinion, *id.* at 466–71, Justice O'Connor never discussed the substantive connection between her analysis in *Ashcroft* and Justice Kennedy's analysis in *Miller*. A coalition district is one in which fewer than half of the voters belong to a particular racial minority but where that group plus a predictable number of other voters can usually carry the district in a general election. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself?* *Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539–40 (2002). I have argued elsewhere that there is no general fixed line between influence and "control" districts. J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 565 (1993).

443. See *Ashcroft*, 539 U.S. at 491–92 (Kennedy, J., concurring).

444. *Id.* at 492 (Souter, J., dissenting).

445. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization*, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 259, 259–60 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project) [hereinafter McDonald Statement] (criticizing the majority opinion's "new, difficult to apply, and contradictory standards").

446. See, e.g., *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 39 (2006) (statement of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.) [hereinafter Adegbile Statement] (warning that the majority opinion gives legislatures too much leeway and "could lead to a very substantial undermining of minority communities to have their voices heard in legislatures").

447. Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 31–32 (2004).

448. Thomas B. Edsall, *High Court Orders Review of Redistricting Plan*, WASH. POST, June 27, 2003, at A17 (quoting optimists).

percentages of whites were willing to vote for qualified minority candidates, minority voters could be spread more thinly, increasing minority influence.<sup>449</sup> Measuring influence districts and other aspects of political power that O'Connor mentioned, according to the optimists, was quite similar to what the Justice Department's Section 5 unit was experienced in doing.<sup>450</sup>

There is a third position, yet to find a voice: skepticism. Even before *Ashcroft* was argued in the Supreme Court, the hardheaded calculations that created the opportunity for O'Connor's practical, ad hoc opinion had proven wildly incorrect. The Democrats lost seats in the Georgia legislature as Republicans, waving another bloody shirt, the Confederate flag, surged in the state's 2002 elections.<sup>451</sup> Among the victims was Senate Majority Leader Charles Walker, an African-American and a chief sponsor of the plan upheld in *Ashcroft*.<sup>452</sup> The state's new Republican Governor, Sonny Perdue, then convinced four white Democratic senators to switch sides, giving the Republicans control of one house of the Georgia legislature for the first time since 1874,<sup>453</sup> and Perdue tried to withdraw the state as a party to the *Ashcroft* lawsuit.<sup>454</sup> Only a ruling by the state supreme court allowed state Attorney General Thurbert Baker, a black Democrat, to continue the litigation.<sup>455</sup>

A skeptic would treat *Ashcroft* as an aberration, the last important voting rights opinion by the pivotal Justice on the Rehnquist Court, Sandra Day O'Connor, one that sidestepped or ignored so many precedents as to have been shaky on the day it was issued. Moreover, *Ashcroft* was

449. See Richard H. Pildes, Op-Ed., *Less Power, More Influence*, N.Y. TIMES, Aug. 2, 2003, at A15 (expressing optimism about *Ashcroft*).

450. See Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 231–37 (2003) (describing how Section 5 works); Meghann E. Donahue, Note, *"The Reports of My Death Are Greatly Exaggerated": Administering Section 5 of the Voting Rights Act After Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651, 1653 (2004) (arguing against "the general perception that *Ashcroft* struck a fatal blow to Section 5 administration").

451. The successful 2002 Republican gubernatorial candidate, Sonny Perdue, bitterly attacked the replacement of the 1956 state flag, which prominently featured the Confederate battle flag and had been chosen to symbolize southern white resistance to integration, with a more subdued state flag containing tiny replicas of all of the former state flags. See Cynthia Tucker, *Miller's Words Make Clear Perdue's Duty*, ATLANTA J.-CONST., Feb. 19, 2003, at A15 (arguing that Perdue used "the Confederate battle emblem as a wedge issue" in his 2002 gubernatorial campaign). For a discussion of the 1956 flag, see KOUSSER, *supra* note 16, at 212–13. In the late nineteenth century, Republicans who stressed the party's role in saving the Union were said to "wav[e] the bloody shirt," which they sometimes did literally. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 487 n.46 (1988).

452. Jim Wooten, Op-Ed., *Thinking Right: After the Vote*, ATLANTA J.-CONST., Nov. 8, 2002, at A21. Walker was reelected to the state senate in 2004. Doug Gross, *Walker Faces Challenge in Return to Senate*, TELEGRAPH (Macon, Ga.), Nov. 5, 2004, at B3.

453. Nancy Badertscher, *Perdue Has Remarkable Debut Week*, ATLANTA J.-CONST., Jan. 19, 2003, at C1.

454. Rhonda Cook, *Stands Harden in Remap Dispute: Baker, Purdue Dig In Their Heels over Appeal*, ATLANTA J.-CONST., Feb. 7, 2003, at F1.

455. Rhonda Cook, *Attorney General's Authority Upheld*, ATLANTA J.-CONST., Sept. 5, 2003, at A1.

undermined by the district court decision in *Larios v. Cox*,<sup>456</sup> which was summarily affirmed by the Supreme Court.<sup>457</sup> Republicans in Georgia convinced a panel of district judges to throw out the 2001 redistricting of both houses of the state legislature, the subject of *Ashcroft*, on the grounds that the Democratic districts were underpopulated compared to the Republican districts, although the population deviations were within the margins that the Supreme Court had previously considered constitutional.<sup>458</sup> While the Supreme Court has never been able to agree on an operational definition of partisan gerrymandering,<sup>459</sup> in this case, simple numerical comparisons of the population of districts carried by Republicans and Democrats sufficed. Miraculously, neither the degree of population inequality nor the extent of partisan bias, taken separately, was enough to overturn a redistricting plan, but when compounded, they formed a mixture that satisfied the Supreme Court.<sup>460</sup> Because *Larios* was decided before the District Court for the District of Columbia could apply the complicated totality-of-circumstances instructions that O'Connor had given it, *Ashcroft* was never actually applied by a court before Congress acted to reverse it in 2006. Nor did the Justice Department, which hastened to rewrite its guidelines after *Bossier II*, reconsider them after *Ashcroft*.<sup>461</sup> When Voting Section staff lawyers meticulously drew on *Ashcroft* in their elaborate seventy-three-page memo recommending rejection of the notorious 2003 Texas "re-redistricting" plan for Congress,<sup>462</sup> political appointees of the Department of Justice dismissed

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456. 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (per curiam), *aff'd*, 542 U.S. 947 (2004).

457. See *Cox v. Larios*, 542 U.S. 947 (2004).

458. *Larios*, 300 F. Supp. 2d at 1350–51; see *Brown v. Thompson*, 462 U.S. 835, 843 (1983) (holding that a district in Wyoming with a 60% deviation from population equality was constitutional).

459. See *League of United Latin Am. Citizens v. Perry (LULAC)*, 126 S. Ct. 2594, 2635 (2006) (Stevens, J., concurring in part and dissenting in part) (refusing to declare the Texas legislature's mid-decade redistricting unconstitutional on partisan-gerrymandering grounds); *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment) (leaving open the possibility of overturning a redistricting on grounds of partisanship but admitting that "[n]o substantive definition of fairness in districting seems to command general assent"); *Davis v. Bandemer*, 478 U.S. 109, 123, 127 (1986) (plurality opinion) (holding that claims of partisan gerrymandering are justiciable but disagreeing as to the standard); *id.* at 161 (Burger, C.J., concurring in the judgment); see also Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Partisan Gerrymanders*, 153 U. PA. L. REV. 541, 544, 544–54 (2004) ("The Court's inability to create a stable set of rules reflects several factors: the changing technology of the redistricting process itself; changes in political dynamics within individual states; and changes and uncertainty about fundamental questions of representation and political fairness.").

460. See *Larios*, 542 U.S. at 947–50 (accepting the reasoning of the lower court's opinion).

461. See Donahue, *supra* note 450, at 1676 n.154 (describing the "nearly identical regulations despite significant doctrinal changes" after *Ashcroft*). The current guidelines are published at 28 C.F.R. § 51 (2007).

462. Section 5 Recommendation Memorandum, *supra* note 26, at 25–71 (analyzing the Texas re-redistricting plan using *Ashcroft*).

the analysis without argument and granted preclearance to the “DeLay plan.”<sup>463</sup>

In the wake of *Larios*, a special master redrew the Georgia state legislative districts,<sup>464</sup> and the subsequent election resulted in extremely few close contests,<sup>465</sup> a Republican takeover of the lower house of the state legislature,<sup>466</sup> and considerably less power for the remaining black representatives. During its next session, the legislature initiated a midterm redrawing of the state’s congressional boundaries in an ultimately unsuccessful effort to pick up two more Republican seats.<sup>467</sup> The strategy of the 2005 Republican congressional plan was to turn *Ashcroft* on its head by removing blacks from the districts of white Democratic incumbents, resulting in a reduction of black influence, reversing *Ashcroft*’s increase in black influence. As the Republican congressman who led the re-redistricting commented on the treatment of one Democrat’s district, “[I]t’s been bleached.”<sup>468</sup>

Putting the cases from 1993 through 2006 together, the nonretrogression standard on the eve of the VRA renewal seemed, at least on its face, to mean that a state did not retrogress when it reduced the number of majority-minority districts, so long as it increased the number of influence districts;<sup>469</sup> that it could always decrease the number of minority-influence districts without retrogressing, so long as it kept the same number of majority-minority districts;<sup>470</sup> but that it must have an extremely strong interest if it wished to increase the number of districts in which minorities could influence or

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463. Eggen, *supra* note 27.

464. Rhonda Cook, *Mapmakers Unveil Redistrict Lines Today*, ATLANTA J.-CONST., Mar. 15, 2004, at D4.

465. See Posting of Nathaniel Persily, npersily@law.upenn.edu, to Election Law Listserv, election-law\_gl@major-domo.lls.edu (Nov. 10, 2004), available at <http://mailman.lls.edu/pipermail/election-law/2004-November/006015.html> (stating that only 11 of 235 contests for the Georgia state legislature had margins of 5% or less).

466. Lynn Westmoreland, Op-Ed., *Fairer District Lines Will Serve All Georgians*, ATLANTA J.-CONST., Feb. 11, 2005, at A15.

467. See Tom Baxter & Jim Galloway, *D.C. May Have a Finger in Senate Remap Plan*, ATLANTA J.-CONST., Feb. 24, 2005, at C5 (describing redistricting plans and their political consequences); Tom Baxter & Sonji Jacobs, *House, Senate Leaders Unveil Redistricting Proposals*, ATLANTA J.-CONST., Feb. 16, 2005, at B4 (same).

468. Jeff McMurray, *Congressmen Tread Lightly on Redistricting*, TELEGRAPH (Macon, Ga.), Mar. 28, 2005, at 3A.

469. See *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003) (“The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters.”).

470. See *League of United Latin Am. Citizens v. Perry (LULAC)*, 126 S. Ct. 2594 (2006) (holding that the Texas legislature was under no federal statutory or constitutional obligation to maintain the number or character of minority influence districts); *Voinovich v. Quilter*, 507 U.S. 146 (1993) (holding that the Republican-dominated Ohio Apportionment Board could pack minorities into legislative districts, even under a mistaken interpretation of its duties under the Voting Rights Act, rather than create additional influence districts).

control the outcome.<sup>471</sup> This the Judicial Redeemers considered equal protection of the law and a lack of abridgement of suffrage because of race.

In 2005, *Ashcroft* lay damaged, disparaged, and disused. It is remarkable that its specter haunted the debate over the VRARA.

## VI. Caution and Duplicity: The 2006 Renewal of the Voting Rights Act

### A. Ironies of Evidence

As the June 29, 2007 expiration date of Section 5<sup>472</sup> began to loom, the question of whether the temporary provision was still justified acquired a name, *Boerne*, that shaped the form but, surprisingly, not the content of the debate over renewal. The centerpiece of the New Federalism jurisprudence of the Rehnquist Court,<sup>473</sup> *City of Boerne v. Flores*, written by Justice Anthony Kennedy on behalf of the same majority responsible for *Shaw*, *Miller*, and nearly all of the other “racial gerrymandering” cases, declared the federal Religious Freedom Restoration Act (RFRA) unconstitutional on the grounds that it was not a “congruen[t] and proportiona[l]” means to combat the injury it aimed to prevent or remedy.<sup>474</sup> Although Justice Kennedy referred favorably to the Voting Rights Act seven times in his opinion,<sup>475</sup> contrasting the record of widespread and persisting racial discrimination that supported the passage of the VRA with the lack of “examples of modern instances of generally applicable laws passed because of religious bigotry” in the past forty years to buttress the RFRA,<sup>476</sup> voting rights supporters worried,<sup>477</sup> and opponents hoped,<sup>478</sup> that the Court would demand an

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471. See *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (stating that in order to satisfy strict scrutiny, the state must demonstrate that districting legislation based on race is narrowly tailored to achieve a compelling interest).

472. Actually, the expiring section was § 4(a)(8), which specified coverage under Section 5, but nearly all commentators used the shorthand that Section 5 was expiring. Michael P. McDonald, *Who’s Covered? Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 323, at 255, 261.

473. Other cases include *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Printz v. United States*, 521 U.S. 898 (1997); and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

474. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

475. *Id.* at 525, 528, 530, 533.

476. *Id.* at 530.

477. See, e.g., McDonald Statement, *supra* note 445, at 11–12 (noting that opponents had launched new challenges against the Voting Rights Act in light of *Boerne*); Hasen, *supra* note 342, at 85–88 (discussing the need for Congress to provide adequate evidence of unconstitutional conduct by the states for the post-*Boerne* Supreme Court); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28

overwhelming record of widespread, quite-recent racial discrimination in voting to justify a 2007 renewal.<sup>479</sup>

The specter of a demand for new evidence of violations for a statute—that, unlike the subjects of the New Federalism cases,<sup>480</sup> had been judged by the Supreme Court to have adequate evidentiary support before<sup>481</sup>—exposed three paradoxes. First, to the extent that Section 5 had been effective in changing the behavior of officials in covered jurisdictions by deterring them from passing racially discriminatory election laws, there would be few recent examples of such laws, and therefore, seemingly little justification for reauthorization.<sup>482</sup> The more congruent and proportional the law to the evils it addressed, the less evidence for the need to continue it.<sup>483</sup> Second, although the number of Justice Department objections to changes in election laws or practices remained roughly constant from 1971 until 1995, it sank thereafter, not only because the 1990s round of redistricting had mostly been litigated by then and because many at-large systems of local government had already been changed to district systems as a result of Section 2 or Section 5 actions, but also because the Supreme Court's decisions in the *Shaw* line of

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N.Y.U. REV. L. & SOC. CHANGE 69, 71 (2003) (asserting that decisions such as *Boerne* suggest that the Act is not as constitutionally immune as previously thought).

478. See, e.g., Thernstrom, *supra* note 70, at 42 (arguing that there has not been sufficient electoral discrimination of late to allow renewal of Section 5 to pass a future application of the congruence-and-proportionality test).

479. Having used the VRA as the benchmark for congruence and proportionality in *City of Boerne*, as well as its progeny (*Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736, 738 (2003); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 373 (2001); *United States v. Morrison*, 529 U.S. 598, 626 (2000); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 640, 647 (1999)), the Court might hesitate to employ those precedents to erase the benchmark.

480. See Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 103–04 (2006–2007) (distinguishing judicial review of the RFRA in *Boerne* from potential judicial review of the reauthorization of Section 5 on the grounds that the VRA has previously passed the congruence-and-proportionality test, while the RFRA had not); see also Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Rethinking Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 323, at 38, 48–50 (arguing that a drop in the number of Justice Department objections to preclearance requests should not be considered evidence of a drop in Section 5 violations).

481. See *City of Rome v. United States*, 446 U.S. 156, 180–81 (1980) (citing 1975 congressional findings on racial disparities in registration and officeholding, as well as on Section 5 objections by the Department of Justice); *South Carolina v. Katzenbach*, 383 U.S. 301, 329–31 (1966) (stressing the evidence of voting discrimination that Congress had considered based on findings by federal courts, the Department of Justice, and the Commission on Civil Rights). Ellen D. Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 HOUS. L. REV. 33 (2007) makes the most thorough argument for emphasizing this point.

482. See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 20 (2007) (arguing that “the evidence of things not seen” supported reauthorization of Section 5 in 2006).

483. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 200 (2007) (pointing to the negotiations prior to local governments submitting changes for preclearance and “requests for more information” from the Justice Department as evidence of the deterrent effect of Section 5).

cases and *Bossier I* and *II* left the Justice Department with little power to object.<sup>484</sup> These judicial restrictions on Section 5 stripped the record of evidence possibly necessary to pass muster with the same Court's *Boerne* decision.<sup>485</sup> Third, if the Court read *Miller v. Johnson*, *LULAC v. Perry*,<sup>486</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>487</sup> and other "colorblind" decisions strictly, then racial considerations would be deemphasized or even banned from governmental decision making.<sup>488</sup> But to justify a renewal of Section 5 and satisfy at least the most extreme interpretations of the *Boerne* line of cases, racial matters would have to be stressed, the continuation of racial divisions underlined, and the prospect of a return to a harsher discriminatory regime in currently covered states and counties, if Section 5 were allowed to lapse, highlighted.

Faced with such dilemmas, proponents pointed out the first two (the effectiveness of the law and the restrictions on Justice Department action), ignored the third (the colorblind decisions), and then compiled the most voluminous and systematic evidentiary record for the VRA ever offered. Not only did a foundation-backed Commission on the Voting Rights Act hold ten hearings around the country, providing forums for local activists and experts to supplement the witnesses that the judiciary committees heard in Washington,<sup>489</sup> but the ACLU compiled an 867-page dossier on Section 2

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484. See Posner, *supra* note 480, at 109–17 (summarizing objection statistics and explaining trends).

485. Richard L. Hasen treats this not as an irony but as a statement of fact. See Hasen, *supra* note 342, at 91–92 (arguing that once Justice Department objections based on interpretations of Section 5 that go beyond retrogressive intent or effect are discounted, there is very little in the Department's evidence that Congress could use to support a case for renewal of Section 5). But if *Beer* and *Bossier II* had governed the interpretation of Section 5 in 1965, there would never have been enough evidence of discrimination to justify Section 5, for one would have had to prove, for instance, that Dallas County, Alabama, officials wished to reduce the number of black registered voters below their then-current 1% or that white supremacists in Mississippi had taken actions that had the effect of reducing the number of black elected officials to fewer than zero.

486. *League of United Latin Am. Citizens v. Perry (LULAC)*, 126 S. Ct. 2594 (2006).

487. 127 S. Ct. 2738 (2007).

488. Justice Kennedy's majority opinion in *Miller v. Johnson* condemned "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting" in its interpretation of Section 5 of the VRA and avoided "these troubling and difficult constitutional questions" by ruling that Congress never intended the Department to adopt such an interpretation. *Miller v. Johnson*, 515 U.S. 900, 927 (1995). Chief Justice Roberts's concurrence in *LULAC v. Perry* contained a plaintive cry, at the least, for "colorblind" electoral rules: "It is a sordid business, this divvying us up by race." *LULAC*, 126 S. Ct. at 2663 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). And Roberts's plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* announced dramatically: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 127 S. Ct. at 2768 (plurality opinion).

489. NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005, at 102 (2006), available at <http://www.votingrightsact.org/report/finalreport.pdf>.

and Section 5 cases from throughout the United States,<sup>490</sup> the Leadership Conference on Civil Rights entered fourteen state reports on voting discrimination into the House and Senate hearing records,<sup>491</sup> and Professor Ellen Katz and her students at the University of Michigan Law School collected and analyzed a database of all published Section 2 cases since the 1982 renewal.<sup>492</sup> In addition, the Russell Sage Foundation and the Earl Warren Institute on Race, Ethnicity, and Diversity published twenty-seven articles by notable voting rights experts reporting on original ideas and research that explored issues related to the renewal.<sup>493</sup> There were numerous scholarly conferences on related topics.

Opponents of the VRA, who regarded *Boerne* and the *Shaw* cases not as threats but as opportunities, also organized evidence to buttress their case. Because they desired to eliminate, rather than to correct, Section 5 and almost everyone expected Congress to renew Section 5 in some form, opponents' appeals were more narrowly targeted at courts, rather than at both courts and Congress. More than VRA proponents, opponents were torn between a *Boerne* strategy of denying the *necessity* of continuing Section 5 and a *Miller* strategy of denying the *morality* or *constitutionality*—they generally elided the two<sup>494</sup>—of any race-conscious governmental actions.<sup>495</sup>

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490. See LAUGHLIN McDONALD & DANIEL LEVITAS, AM. CIVIL LIBERTIES UNION, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT: VOTING RIGHTS LITIGATION, 1982–2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006), available at [http://www.aclu.org/votingrights/2005\\_report.pdf](http://www.aclu.org/votingrights/2005_report.pdf).

491. Tucker, *supra* note 12, at 218.

492. See Ellen Katz with Margaret Aisenbrey et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006).

493. See THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 323 (containing fifteen articles published by the Russell Sage Foundation); VOTING RIGHTS ACT REAUTHORIZATION OF 2006, *supra* note 241 (containing twelve articles published by the Earl Warren Institute). Although, because of the speed at which the renewal occurred, these two collections were not published until after the VRARA passed, many of their substantive points were made in testimony before congressional committees, often by the authors of the articles.

494. See, e.g., *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 8 (2006) (statement of Abigail Thernstrom, Senior Fellow, The Manhattan Institute) [hereinafter Thernstrom Statement] (asserting that “race-conscious maps send the wrong message” and quoting Justice Kennedy’s decision in *Miller v. Johnson*, 515 U.S. 900, 912 (1995)).

495. See, e.g., *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 14 (2006) (statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity) [hereinafter Clegg Statement] (stating that the VRARA proposal “tries to guarantee racial gerrymandering and racial segregation”); *id.* at 15 (condemning the VRARA proposal “because it has no plausible record basis”); *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 15, 14–15 (2005) (statement of Edward J. Blum, Visiting Fellow, American Enterprise Institute) [hereinafter Blum Statement] (arguing that the data on minority participation in Georgia’s election process, collected in CHARLES S. BULLOCK III & RONALD KEITH GADDIE, AM. ENTER. INST., AN ASSESSMENT OF VOTING RIGHTS PROGRESS IN GEORGIA (2005), available at [http://www.aei.org/docLib/20060210\\_](http://www.aei.org/docLib/20060210_)



Concentrating on abstract generalizations,<sup>496</sup> rather than the graphic human stories and specific local facts that had enlivened the case for federal protection of voting rights since the head-cracking troopers had backed up the registration-denying election administrators at Selma,<sup>497</sup> opponents eschewed hearings or reviews of the myriad discrimination cases. Instead, they presented tables of estimates of registration, turnout, and minority officeholding<sup>498</sup> and graphs of final Justice Department Section 5 objections.<sup>499</sup> This was an odd type of evidence to prepare to influence the courts, which specialize in concrete controversies featuring individual plaintiffs and defendants, seeing the world only through a grain of sand, rather than the comprehensive surveys that Congress, legislating for the nation, must necessarily contemplate. The “conservatives” emphasis on abstractions constituted an implicit recognition of the departure from judicial traditions—the policy-setting, legislative nature of the *Boerne* line of cases. Yet their “hard” statistical argument rested on a soft, unverifiable, culturally based foundation—the assumption that the apparent decline in discrimination and behavioral inequities represented a change of heart, a revolutionary shift in cultural attitudes,<sup>500</sup> rather than, as the more skeptical proponents of the VRA asserted,<sup>501</sup> the deterrent effect of changes in institutional rules, an effect that might disappear if the rules were suspended.<sup>502</sup>

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Georgia.pdf, “simply don’t justify the stringent and unique infringement on federalism principles that the Court recognized in . . . *City of Boerne*”); Thernstrom & Blum, *supra* note 8 (“Draconian federal intrusion into local elections was justified when it was the only way to enfranchise Southern blacks—but 40 years on, it’s an unconstitutional travesty.”).

496. See Clegg Statement, *supra* note 495, at 21 (condemning proponents for having produced evidence that was “almost all scattered and anecdotal rather than systematic and statistical”).

497. For an example during the 2005–2006 hearings, see *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9 (2006) (statement of Armand Derfner, Att’y, Derfner, Altman & Wilborn).

498. See generally, e.g., American Enterprise Institute, Minority Voting Studies of Jurisdictions Covered by Section Five of the Voting Rights Act, [http://www.aei.org/publications/pubID.23859,filter.all/pub\\_detail.asp](http://www.aei.org/publications/pubID.23859,filter.all/pub_detail.asp) (providing links to studies collecting data on minority participation in the election process of states covered by Section 5 and arguing that discrimination against black voters has abated to the point that Congress should allow Section 5 to expire).

499. See generally, e.g., U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS, at x fig.ES-1 (2006) [hereinafter U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION].

500. See *id.* at 83 (concurring statement of Commissioner Abigail Thernstrom) (concluding that the VRA “revolutionized the status of blacks” and that “America was changed irrevocably”).

501. See *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5–6 (2006) (statement of Drew S. Days III, Professor, Yale Law School) (arguing that the historical record of vigorous enforcement of Section 5 by the Justice Department proved a deterrent to any attempt by a covered jurisdiction to make a change that would not meet the criteria of Section 5).

502. Thus, “conservatives” in the VRARA debate revealed themselves as the true followers of the tradition of the French Revolution, while “liberals” perhaps more closely resembled the Revolution’s classic conservative Anglo-Saxon critic, Edmund Burke. See generally EDMUND

Perhaps even more interesting than the evidence actually introduced during the formal congressional hearings was the evidence *not* presented. Civil rights organizations had for some years been challenging the disfranchisement of felons, often including those on parole and sometimes lasting for life, as racially discriminatory under Section 2 of the VRA, as well as under the Fourteenth and Fifteenth Amendments.<sup>503</sup> Supporting their position was a series of social-scientific studies on the incidence and effects of the practice.<sup>504</sup> Even though this was a restriction on individuals' votes, the type of restriction that critics of the VRA believed less objectionable than attacks on structural rules,<sup>505</sup> no testimony on the subject was given before Congress and no amendment banning or restricting the practice was entertained.<sup>506</sup> Another individual-level restriction that was invisible during the hearings, one that bitterly split the major political parties in every state where it was suggested, was the requirement that voters who appeared at the polls had to present some form of government-issued identification in order to be able to vote.<sup>507</sup> Nor were there hearings on the administration of Section 5, an explosive topic because of partisan considerations that apparently resulted in overturning staff recommendations to deny preclearance in high-profile submissions from Mississippi, Texas, and

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BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

503. *See, e.g.*, *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004), *cert. denied*, 543 U.S. 978 (2004); *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), *vacated, reh'g granted*, 405 F.3d 1214 (11th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1015 (2005); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *reh'g denied*, 359 F.3d 1116 (9th Cir. 2004), *cert. denied sub nom. Locke v. Farrakhan*, 543 U.S. 984 (2004); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc); *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273 (E.D. Wash. July 7, 2006); *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002); *Gooden v. Worley*, No. CV-2005-5778-RSV (Ala. Cir. Ct. Jefferson County Aug. 23, 2006), *rev'd sub nom. Chapman v. Gooden*, No. 1051712, 2007 WL 1576103 (Ala. June 1, 2007). *See generally* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006) (arguing that Section 2 should be applied to voter identification and felon disfranchisement).

504. *See, e.g.*, SASHA ABRAMSKY, CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE (2006); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006); J. Morgan Kousser, *Disfranchisement Modernized*, 6 ELECTION L.J. 104 (2007) (reviewing ABRAMSKY, *supra*, and MANZA & UGGEN, *supra*).

505. *See, e.g.*, THERNSTROM, *supra* note 18, at 24 (contending that "[b]asic enfranchisement had been the sole goal" of the VRA).

506. Because most criminal disfranchisement laws derived from laws passed some time ago, they might not be subject to Section 5, but their critics could always have sought to amend Section 2, as other critics had when Section 5 had come up for renewal in 1980–1982.

507. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 33, 33 (2007) (mem.) (granting certiorari in a challenge to Indiana's requirement that voters present photo identification at the polls); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1372–73 (N.D. Ga. 2005) (examining, under the Voting Rights Act, a Georgia statute requiring photo identification at the polls); *see also* Tova Andrea Wang, Century Found., ID and Voting Rights (Aug. 29, 2005), <http://www.tcf.org/list.asp?type=NC&pubid=1084> (referring to new voter-identification laws as "the voting rights barrier of the 21st Century").

Georgia.<sup>508</sup> Any of these issues could have wrecked the bipartisan coalition in favor of the carefully negotiated framework of the bill. Finally, neither side presented systematic social-scientific studies on changing the basis of Section 5 coverage, that is, which counties would be covered<sup>509</sup> and what evidence there was of discrimination in those and similar places. Civil rights forces feared that they would lose congressional supporters if they tampered with the coverage formula,<sup>510</sup> while opponents only presented contrasts between conditions in currently covered and currently uncovered states in order to undermine any continuation of Section 5 at all.<sup>511</sup>

Before and even after the bills were finally formulated and simultaneously introduced into the House and Senate,<sup>512</sup> discussions of changes in the VRA were wide-ranging and extensive. Among the most far-reaching proposals were:

- restrictions on felon-disfranchisement and voter-identification laws;<sup>513</sup>
- election-day registration, facilitation of the naturalization of legal aliens, and noncitizen voting, all of which would increase Latino turnout;<sup>514</sup>

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508. See Dan Eggen, *Democrats Won't Get Justice Memo: Texans Say Document Could Embarrass GOP*, WASH. POST, Jan. 22, 2004, at A23 (discussing the Justice Department's refusal to release internal documents analyzing the Texas re-redistricting); Eggen, *supra* note 27 (exposing the existence of a Justice Department staff memo finding that the Texas re-redistricting violated the VRA); Dan Eggen, *Politics Alleged in Voting Cases: Justice Officials Are Accused of Influence*, WASH. POST, Jan. 23, 2006, at A1 (discussing the politicization of Voting Section decisions in Georgia, Mississippi, and Texas); Todd J. Gillman & Michelle Mittelstadt, *AG Says Texas Remap Approval Not Political: Democrats Hoping Leaked Justice Memo Will Help Their Case Before Supreme Court*, DALLAS MORNING NEWS, Dec. 3, 2005, at 1A (reporting on Democrats' acquisition of a Justice Department internal memorandum opposing the Texas district map).

509. Two opponents of the VRARA did later total the number of counties in each state that would be covered under the "Norwood Amendment," which proposed changing the coverage formula to target those counties where overall turnout was less than 50% in the last three presidential elections. Charles S. Bullock, III & Ronald Keith Gaddie, *Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act*, 5 GEO. J.L. & PUB. POL'Y 1, 13–15 (2007).

510. See, e.g., Persily, *supra* note 483, at 209, 208–09 (arguing that debating the coverage formula would likely cause the "complete unraveling of the bill").

511. See, e.g., EDWARD BLUM & LAUREN CAMPBELL, AM. ENTER. INST., ASSESSMENT OF VOTING RIGHTS PROGRESS IN JURISDICTIONS COVERED UNDER SECTION FIVE OF THE VOTING RIGHTS ACT 2–8 (2006), available at [http://www.aei.org/docLib/20060515\\_BlumCampbell\\_report.pdf](http://www.aei.org/docLib/20060515_BlumCampbell_report.pdf) (using voter-registration data to demonstrate similar rates in states covered by Section 5 and those not covered).

512. S. 2703, 109th Cong. (as introduced on May 3, 2006); H.R. 9, 109th Cong. (as introduced on May 2, 2006).

513. E.g., VERNON FRANCIS ET AL., LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, PRESERVING A FUNDAMENTAL RIGHT: REAUTHORIZATION OF THE VOTING RIGHTS ACT 15 (2003).

514. Rodolfo O. de la Garza & Louis DeSipio, *Reshaping the Tub: The Limits of the VRA for Latino Electoral Politics*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 323, at 139, 148–54.

- changing coverage to emphasize minority percentages, rather than 1960s' literacy tests and 1960s' and 1970s' turnout;<sup>515</sup>
- basing coverage on more recent elections;<sup>516</sup>
- using a multifactor test to determine coverage;<sup>517</sup>
- covering counties, not states, automatically releasing from Section 5 coverage those counties without recent Section 5 objections and automatically covering counties anywhere that lost Section 2 cases;<sup>518</sup>
- allowing cities, towns, villages, or special-purpose districts to bail out even if the county in which they were situated could not or did not bail out;<sup>519</sup>
- simplifying bailout procedures or advertising them more widely, which would target the law more precisely at the most likely violators;<sup>520</sup>
- moving preclearance of statewide redistricting entirely into the federal courts to reduce the influence of partisan concerns;<sup>521</sup>
- allowing appeals by private parties of the Justice Department's failure to object to changes in election laws;<sup>522</sup>
- explicitly allowing multimember districts elected by using proportional representation;<sup>523</sup>
- eliminating coverage according to explicit criteria but allowing minority citizens, generally represented by formal interest groups, to "opt in" to Justice Department preclearance;<sup>524</sup>

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515. Persily, *supra* note 483, at 195, 218.

516. McDonald, *supra* note 472, at 264–67.

517. Spencer Overton, *The Coverage Curve: Identifying States at the Bottom of the Class*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 323, at 242, 242–46. All coverage changes would exclude some southern jurisdictions that are currently covered and include other jurisdictions in southern and nonsouthern states. *See id.* at 246, 242–46 (arguing that application of a “diverse array of factors,” by providing a “more comprehensive measurement” of current “racial dysfunction,” could change which states must comply with the preclearance provisions).

518. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 13 (2006) (statement of Samuel Issacharoff, Professor, New York University School of Law) [hereinafter Issacharoff Statement]. As a result of the withdrawal of coverage at the state level, statewide redistricting would not be subject to Section 5 requirements under the Issacharoff proposal.

519. J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006*, *supra* note 241, at 257, 274.

520. FRANCIS ET AL., *supra* note 513, at 11; McDonald, *supra* note 472, at 267–69.

521. Persily, *supra* note 483, at 215. This proposal assumes that judges are immune to partisan concerns in VRA cases, an assumption belied by Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

522. FRANCIS ET AL., *supra* note 513, at 14.

523. *Id.* at 16.

524. *See* Heather K. Gerken, *A Third Way: Section 5 and the Opt-In Approach*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 323, at 277.

- continuing the current preclearance regime for local jurisdictions, but allowing citizens' groups to force states to negotiate about state laws, and if negotiations failed, submitting the state law to a new, bipartisan Voting Rights Enforcement Commission—if the Commission deadlocked, federal courts would take over;<sup>525</sup>
- moving from the race-oriented “antidiscrimination model” of the VRA to “protection of voting rights as such,” on the model of the National Voter Registration Act and the Help America Vote Act.<sup>526</sup>

Proposals to overturn the Supreme Court's decisions in *Ashcroft* and *Bossier II* (but not *Bossier I*)<sup>527</sup> were less far-reaching, only restoring the status quo ante 2000, and moves to scrap Section 5 entirely<sup>528</sup> were, of course, even more radical.

Politics eliminated all but the smallest changes in Section 5 from being seriously considered.

### B. *The Politics of Renewal*

Proponents of renewal in 2006 suffered from the lack of an enemy to rally against. In 1965, sluggish southern federal judges and slugging Alabama State Troopers provided inspiring targets, and in 1970, 1975, and 1982, Presidents Nixon, Ford, and Reagan had opposed extensions of Section 5. But polarizing President George W. Bush first seemed uninformed about the Act,<sup>529</sup> then generally committed to renewal,<sup>530</sup> wavering during the week after House passage of the bill, and only after a majority of the Senate endorsed the measure was he in full support of the Act.<sup>531</sup> Substituting a nostalgic nemesis for a current one, the sponsors symbolically named the VRARA for the heroine of the 1964 Mississippi Freedom Democratic Party, Fannie Lou Hamer, and two icons of the southern struggle against segregation, Rosa Parks and Coretta Scott King, seeking successfully to

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525. Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 830–41 (2006). Tokaji's principal concern is avoiding partisanship in preclearance decisions by the Justice Department.

526. *The Continuing Need for Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 206 (2006) (statement of Richard H. Pildes, Professor, New York University School of Law) [hereinafter Pildes Statement]. For an expansion of Pildes's argument, see Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006). The purpose would be to deal with such laws as felon disfranchisement, voter identification, and redistricting, where courts and the Justice Department have difficulty distinguishing racial from partisan motives.

527. Explicitly reversing *Bossier I* would restore, more securely, the connection between Sections 2 and 5, making dilution of minority votes a reason for denying preclearance and effectively reversing *Beer*.

528. Edward Blum & Roger Clegg, *Color Inside the Lines*, LEGAL AFFAIRS, Nov.–Dec. 2003, at 18, 20; *Jackson's Plan Would Extend Voting Wrongs*, MOBILE REG., Mar. 12, 2005, at A12.

529. McDonald, *supra* note 472, at 270.

530. Tucker, *supra* note 12, at 211.

531. *Id.* at 259–60.

identify those who voted against the Act with opponents of the Civil Rights Movement.<sup>532</sup>

If the Bush Administration was tepid, Republicans in Congress were split. By July 2005, Senate Majority Leader Bill Frist and the whole House Republican leadership had joined Republican National Committee Chair Ken Mehlman, the party's most visible proponent of attracting minority votes, in strong support of renewal.<sup>533</sup> House Judiciary Committee Chair James Sensenbrenner, a dependable friend of minority voting rights since the 1981–1982 renewal hearings, guaranteed that the bill would move rapidly.<sup>534</sup> Indeed, the impetus behind renewing Sections 5 and 203 a year before they were to sunset was the prospect that Sensenbrenner would be replaced as Judiciary Committee Chair by Representative Lamar Smith of Texas, an outspoken opponent of renewing Section 5.<sup>535</sup> On the other hand, Republican intellectuals, such as Abigail Thernstrom, Edward Blum, and Roger Clegg, opposed any renewal as a violation of “colorblind” policies, and they testified in Congress and harshly criticized the Republican leadership in op-eds in conservative newspapers and on conservative Web sites.<sup>536</sup> Some Republican politicians from currently covered jurisdictions favored changes in coverage formulas that would free their areas from preclearance,<sup>537</sup> and the anti-immigrant fervor that especially affected southern and midwestern Republicans often overflowed into opposition to language provisions for citizen voters and threatened to hold up renewal as a whole.<sup>538</sup>

By contrast, Democrats were steadfastly united, benefitting from the party's 1994 loss of southern moderates, who might have opposed the bill's effort to overturn *Ashcroft*, and in general from their dozen years as a powerless, beleaguered minority, which bred a desperate solidarity. As if to disprove Justice O'Connor's assertion in *Shaw v. Reno* that “segregated” minority-opportunity districts would elect insular representatives who

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532. That this appeal succeeded with an American public notoriously ignorant of and oblivious to history may have been due to its embodiment in the almost-martyred civil-rights-leader-turned-Congressman John Lewis, who remarked during the floor debate:

We cannot separate the debate today from our history and the past we have traveled. When we marched from Selma to Montgomery in 1965, it was dangerous. It was a matter of life and death. I was beaten[;] I had a concussion at the bridge. I almost died. I gave my blood, but some of my colleagues gave their very lives.

*Id.* at 253.

533. *Id.* at 212–13, 259.

534. *Id.* at 213–17.

535. *Id.* at 216, 238 n.332. By the rules of the 1994 “Contract with America,” Republicans could serve as House Committee Chairs for only three terms, and Sensenbrenner's six years would be up in January 2007. *Id.* at 216 n.105.

536. See Thernstrom Statement, *supra* note 494; Clegg Statement, *supra* note 495; Blum Statement, *supra* note 495; Blum & Clegg, *supra* note 528, at 20; Blum, *supra* note 8; Thernstrom & Blum, *supra* note 8; Abigail Thernstrom, *Emergency Exit: Abigail Thernstrom on Why Congress Would Be Wise to Let Part of the Voting Rights Act Expire*, N.Y. SUN, July 29, 2005, at 10.

537. Tucker, *supra* note 12, at 237, 243–44.

538. *Id.* at 236–43.

listened only to their black constituents,<sup>539</sup> the Democrats named Mel Watt, Chairman of the Congressional Black Caucus, who was elected from the district targeted in *Shaw* and who served his white constituents well enough to survive the court-ordered reconfiguration of the district into a majority-white seat, as the party's chief negotiator with the Republican leadership.<sup>540</sup> Watt reportedly worked well with Sensenbrenner and kept his own troops in line, for example, convincing black members not to campaign too intensely for the bill, for fear of alienating Republicans, and not to offer amendments that would disturb the agreement carefully negotiated with Republican leaders.<sup>541</sup>

Anxious to pass a bill before Representative Sensenbrenner lost his chairmanship, Democrats and civil rights groups refrained from explicitly trying to impede the passage of voter-identification laws or to make any other substantial changes<sup>542</sup> and settled for a renewal of Section 5 with four principal provisions:

- a straightforward reversal of *Bossier II* that substituted *or for and between purpose and effect*, and defined purpose as *any discriminatory purpose*, which together would allow for a denial of preclearance on the basis of retrogressive effect alone or discriminatory purpose alone, and for any discriminatory racial purpose, not just a *purpose to retrogress*;<sup>543</sup>
- a more equivocal reversal of *Ashcroft* that stated that the purpose of Section 5 “is to protect the ability of such citizens to *elect* their preferred candidates of choice,”<sup>544</sup> which was meant to deny congressional approval of trade-offs of control districts for influence districts;
- a renewal for twenty-five years; and
- no changes in coverage or bailout provisions.

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539. See *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (“[T]he plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race. . . . [W]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”).

540. Tucker, *supra* note 12, at 213–14. Civil rights organizations agreed to let Watt negotiate for them as well. *Id.* at 213–14.

541. See *id.* at 214–16 (recounting the Watt–Sensenbrenner negotiations and Watt’s role in disciplining other black members); Mikhail Posting, *supra* note 10 (describing cautionary restraints placed on black members of Congress).

542. Mikhail Posting, *supra* note 10; see also *Congress to Consider Voting Rights Act*, LA. WKLY., Oct. 31, 2005, available at <http://www.louisianaweekly.com/weekly/news/articlegate.pl?20051031b> (reporting that, except for two amendments, “civil-rights activists want Congress to pass a clean 25-year extension”).

543. See Tucker, *supra* note 12, at 222 (“In this manner, Congress clarified that a Section 5 objection could be made based upon discriminatory purpose, effect, or both.”).

544. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. § 1973c) (emphasis added).

The short list of changes was less impressive than the 1970 permanent ban on literacy tests and expansion to nonsouthern counties, the 1975 addition of special protection for language minorities, or the 1982 invigoration of Section 2 and liberalization of the bailout provisions by letting counties escape coverage,<sup>545</sup> but these changes protected “hard-won gains [in minority-held elective offices] from disappearing”<sup>546</sup> and served some interests of civil rights groups and both major political parties without alienating a blocking coalition.

The most important part of the VRARA, the “*Bossier II* fix,”<sup>547</sup> attracted the least attention, while the proposal for the most straightforward change in the coverage formula, the Norwood Amendment in the House of Representatives, would have established a coverage pattern so bizarre<sup>548</sup> as to guarantee that the Act would be “*Boerned*.”<sup>549</sup> Because the Justice Department had increasingly objected to proposed changes because of their discriminatory, but not necessarily retrogressive purposes during the 1980s and 1990s, failure to overturn *Bossier II* would have doomed Section 5 to disuse, as it essentially had since 2000.<sup>550</sup> Because Republicans, except for “colorblind” purists like Roger Clegg,<sup>551</sup> wanted to avoid being seen as

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545. Before 1982, only states could bail out if the whole state was a covered jurisdiction. The 1982 Senate Report had expected “most” covered jurisdictions to bail out as a result of the 1982 amendments. S. REP. NO. 97-417, at 60 (1982).

546. Adegbile Statement, *supra* note 446, at 49.

547. In *The Promise and Pitfalls of the New Voting Rights Act*, Nate Persily dismisses the *Bossier II* amendment in a footnote, Persily, *supra* note 483, at 217 n.165, emphasizing instead the amendment that dealt with *Ashcroft*, *id.* at 217. I disagree on two grounds. First, because most of the at-large election systems that could be dismantled under the VRA have been dismantled and most of the minority-opportunity districts, for African-Americans at least, that could be created have been created, the number of retrogressive-effect objections under Section 5 is very likely to continue to decline. Purpose objections increased markedly as a percentage of all objections before *Bossier II*, and they will resume their growth with its reversal. Second, as explained above, *Ashcroft* was a very insecure precedent after Justice O'Connor's retirement, and as explained below, the legislative plan at issue in the case might well have passed muster under the VRARA. That is, the *Ashcroft* “fix” may not have fixed anything.

548. The Norwood Amendment would have covered only those jurisdictions with a discriminatory policy currently in place or in which less than 50% of those eligible to vote had actually turned out in one of the last three elections. *Historic Voting Rights Act Extended*, 62 CONG. Q. ALMANAC 16-6, 16-8 (2006). If it had been adopted, fewer than half of the counties in Mississippi and only 10% of the parishes in Louisiana would have been covered, but more than two-thirds of the counties in Tennessee and over half of those in Kentucky, two border states that had never been covered before, would have been subject to preclearance. Bullock & Gaddie, *supra* note 509, at 15. Nearly as many counties would have been covered in Indiana and Pennsylvania, as in Alabama and South Carolina. *Id.* While Sensenbrenner declared that the Norwood Amendment “turns the Voting Rights Act into a farce,” Watt charged that it represented an effort to render it unconstitutional. Tucker, *supra* note 12, at 255. The amendment was defeated 318–96. *Id.*

549. Coined here as a verb, “to *Boerne*” means for a court to declare a law unconstitutional by ruling that it is not, in the judges’ opinions, congruent and proportional to the evils it aims to correct.

550. See McCrary et al., *supra* note 154, at 313–14 (noting that *Bossier II* caused an 83% drop in Section 5 preclearance objections).

551. See Clegg Statement, *supra* note 495, at 13–15 (opposing overthrow of *Bossier II*).



outright opponents of Section 5 renewal,<sup>552</sup> and Democrats had to remain true to their minority supporters and colleagues, it was inevitable that the *Bossier II* change in the VRA would pass easily.<sup>553</sup>

Despite a great deal of rhetoric, Congress did not so much reverse *Ashcroft* as remand it to the courts with equivocal instructions.<sup>554</sup> Republicans, believing that the decision might have some life left in it even after Justice O'Connor's retirement, were concerned that where Democrats controlled redistricting, they would strategically spread minority voters to maximize the number of elected Democrats,<sup>555</sup> while civil rights groups, sharing the Republicans' anxieties, worried that the Democratic redistricters' actions would mean fewer minorities in office.<sup>556</sup> Democrats hesitated to attack the unusual alliance between Republicans and civil rights groups for fear of alienating their normal allies and derailing the negotiated settlement, leaving lawyers and political scientists as the only defenders of *Ashcroft*.<sup>557</sup>

552. See Persily, *supra* note 483, at 180 (“[V]irtually no one wanted to be on record opposing the legislation.”).

553. There was no separate roll-call floor vote on the *Bossier II* fix.

554. Recognizing this fact, Nate Persily spends nearly half of his article on the VRARA trying to construct a standard, without much guidance in the congressional records. See Persily, *supra* note 483.

555. See, e.g., *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10–11 (2006) (statement of Michael A. Carvin, Partner, Jones Day) (asserting that Democratic efforts to establish influence districts provided minorities with the opportunity to elect their representatives of choice—if their choice was a white Democrat); Michael A. Carvin & Louis K. Fisher, “A Legislative Task”: *Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 12–27 (2005) (detailing the Democrats’ influence-district strategy and giving examples of Democratic redistricting plans that shifted blacks from minority districts to white Democratic districts). Carvin argued the *Bossier* cases for the parish before the Supreme Court and represented nine states in post-2001 redistricting cases. *Id.* at 2; *Reno v. Bossier Parish School Board (Bossier II)*, 528 U.S. 320, 322 (2000), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. § 1973c); *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 473 (1997).

556. See McDonald Statement, *supra* note 445, at 130 (denouncing Justice O'Connor’s transformation of the retrogression standard into “something subjective, abstract, and impressionistic” that prevents minorities from electing candidates of their choice or own race); Adegbile Statement, *supra* note 446, at 52 (describing a Louisiana case in which the “ability-to-elect standard protected against elimination of minority voting strength” because *Georgia v. Ashcroft* did not govern the outcome).

557. See *Reauthorizing the Voting Rights Act’s Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 272 (2006) (statement of Carol M. Swain, Professor of Political Science and Professor of Law, Vanderbilt University) (approving *Ashcroft* “because it allows for the creation of more opportunities for minorities to form coalitions and exert influence on politicians outside their own racial and ethnic groups”); Pildes Statement, *supra* note 526, at 198 (contending that reversing *Ashcroft* “will harm the long-term interests of minority voters, frustrate the formation of interracial political coalitions in the South, and be damaging to American democracy”); Hasen Statement, *supra* note 21, at 10 (favoring “tweaking rather than reversing the *Ashcroft* standard”); Robert F. Bauer, Gen. Counsel, Democratic Senatorial Campaign Comm., *Defending Georgia v. Ashcroft (While Supporting Renewal of the Voting Rights Act)* 4

The crucial point, which was left in a muddle, was how large the group had to be in order to be considered able to elect its preferred candidate. Senate Republicans insisted that any district in which minorities constituted less than 50% of the voting-age or citizen-voting-age population would be ineligible for protection under Section 5.<sup>558</sup> Thus, a 49.9% black district could be sliced up during redistricting without violating Sections 2 or 5.<sup>559</sup> The highly partisan Senate Report even claimed that the *Ashcroft* fix applied only to “naturally occurring majority-minority districts,”<sup>560</sup> conveniently ignoring the entirely artificial, unnatural nature of redistricting. Republican Majority Leader Mitch McConnell went further, requiring that the minority-preferred candidate in such a district had to be a member of a racial minority for Section 5 to apply.<sup>561</sup> For these Republicans, color lines not only had to be drawn, they had to be very bright. On the other hand, Democrats in both houses and the House Judiciary Committee read the language of the *Ashcroft* amendment differently, believing that it contained no impenetrable barrier at 50%, but instead allowed coalition districts if minorities and enough sympathetic Anglos could demonstrably elect candidates of their choice in particular areas.<sup>562</sup> As the House Report put it, “Voting changes that leave a minority group less able<sup>563</sup> to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under

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(June 18, 2006), available at <http://www.moresoftmoneyhardlaw.com/clientfiles/GAvAshcroft.pdf> (praising *Ashcroft* for “[a]djusting retrogression analysis to accommodate creative, flexible political action favorable to minority political interests”); David Epstein, *Democratic Dilemmas: The Conversation No One Is Having About the Voting Rights Act*, AM. PROSPECT, Aug. 4, 2006, [http://www.prospect.org/cs/articles?article=democratic\\_dilemmas](http://www.prospect.org/cs/articles?article=democratic_dilemmas) (contending that *Ashcroft* offered minorities more opportunities for election).

558. S. REP. NO. 109-295, at 20–21 (2006). For an even clearer statement by perhaps the most influential Republican lobbyist on the VRARA, see Carvin & Fisher, *supra* note 555, at 14.

559. The Republicans’ approach to the *Ashcroft* fix was largely undercut by their acquiescence in the *Bossier* fix, for the Justice Department could always object to a change as having a discriminatory purpose, even if the baseline district was less than 50% minority in the voting-age population or seemed noncompact or otherwise “unnatural.” This observation reduces the significance of the *Ashcroft* fix even further.

560. S. REP. NO. 109-295, at 21. The phrase *naturally occurring majority-minority districts* can be traced back at least as far as Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 355 (1996).

561. Persily, *supra* note 483, at 222–23.

562. Even the chief trial counsel for the United States in *Ashcroft*, who was generally quite hostile to the Supreme Court’s decision in the case, included coalition districts among the “ability-to-elect districts” that he thought should be preserved for a redistricting plan to satisfy Section 5. David J. Becker, *Saving Section 5: Reflections on Georgia v. Ashcroft and Its Impact on the Reauthorization of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006, *supra* note 241, at 223, 250.

563. Another ambiguity, one that has characterized the retrogressive interpretation of Section 5 from the beginning, was the definition of the baseline condition. Could an increasingly minority district in which minorities could not yet elect their candidate of choice have its minority percentage cut substantially without violating the amended Section 5? Must a district currently occupied by a minority-preferred candidate, but which has fallen behind the state average in population growth, be redrawn to continue it as a minority-opportunity district?

Section 5.”<sup>564</sup> This described exactly the three state senate districts that were at issue in *Georgia v. Ashcroft*, even though the legislature miscalculated the chances of African-Americans in several districts in which the black voting-age population was close to 50%.<sup>565</sup> Did the VRARA really reverse *Ashcroft*?

The arguments that civil rights groups made in 2006 for overturning *Bossier II* and *Ashcroft* contradicted those they had made against *Bolden* and *Beer* twenty-five years earlier, and the somersaults were yet another indication of how much weaker their political position had become. In 1981–1982, those seeking to override *Bolden* had decried the necessity to prove purpose as both terribly difficult and as fundamentally irrelevant to whether the law now discriminated,<sup>566</sup> and they had separated Section 2’s statutory effect standard from *Bolden*’s Fifteenth Amendment constitutional standard.<sup>567</sup> In 2006, the same forces demanded the restoration of a purpose requirement to Section 5, in full vigor, and insisted that the Fifteenth Amendment’s purpose interpretation guaranteed the constitutionality of the *Bossier II* amendment.<sup>568</sup> In 1981–1982, civil rights supporters had rather too quietly condemned Justice Stewart’s opinion in *Beer*,<sup>569</sup> which may have prevented them from mustering the votes to overturn the Supreme Court decision expressly in the law’s text.<sup>570</sup> In 2006, they treated *Beer* as a divinely inspired commentary

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564. H.R. REP. NO. 109-478, at 71 (2006) (emphasis added).

565. See *supra* notes 434–38 and accompanying text.

566. See *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 1189–201 (1982) (statement of Frank R. Parker, Director, Voting Rights Project, Lawyers’ Comm. for Civil Rights Under Law) [hereinafter Parker Statement] (arguing that the intent requirement subverts the purposes of the Voting Rights Act); S. REP. NO. 97-417, at 16 (1982) (“The Committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.”).

567. See S. REP. NO. 97-417, at 25, 25–27 (noting that Justice Stewart’s opinion in *Bolden* ruled that Section 2 “requires proof of discriminatory intent” and that the Fifteenth Amendment “does not reach voting dilution claims,” but nevertheless proceeding to amend Section 2 to delete the purpose requirement that Stewart had ruled necessary).

568. See *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 27–28 (2005) (statement of Brenda Wright, Managing Att’y, National Voting Rights Institute) (calling for the reversal of *Bossier II* and the restoration of the Section 5 purpose test).

569. See Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION, *supra* note 18, at 85, 105 (“The Supreme Court’s *Beer* decision dealt minority voting rights a severe setback.”). Parker’s congressional testimony in 1982 did not mention *Beer*. See Parker Statement, *supra* note 566.

570. For a discussion of the 1982 Senate Report’s *Beer* footnote, see *supra* notes 258–60 and accompanying text.

on the scripture and as Justice O'Connor's explicit endorsement of influence districts as heretical.<sup>571</sup>

Although there was a vote in the House on a ten-year, rather than a twenty-five-year, extension of the expiring sections of the law,<sup>572</sup> there was never any open, reasoned debate on the issue. In light of the country's 387-year history of racial discrimination, no one could argue convincingly that any particular number of years would suffice to accomplish the necessary transformation. What was hurried was not the timetable for expiration but the timetable for passage of the bill itself, as evidenced by the fact that starting the twenty-five-year clock from 2006, rather than 2007, the original target date for renewal, meant that Section 5 would expire just as the 2031 redistricting cycle was reaching its height.

The only sustained public debate over the VRARA concerned coverage areas, and the focus even here was less on attacking continuing discrimination precisely than on satisfying the Supreme Court—not on actual congruence and proportionality but on getting five votes to sustain the VRARA under *Boerne*.<sup>573</sup> In this debate, federalism concerns, which had bulked so large in 1965, were treated as a minor problem of abstruse philosophy, not actual practice. By the year 2000, state and local governments in covered jurisdictions had become so accustomed to making submissions to the Justice Department<sup>574</sup> that they had little difficulty in filing approximately 20,000 of them each year.<sup>575</sup> Indeed, every major national

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571. See Adegbile Statement, *supra* note 446, at 47–48 (contending that the Supreme Court “suddenly abandoned the straightforward approach adopted in *Beer*” in its opinion in *Georgia v. Ashcroft*).

572. The ten-year-extension amendment was sponsored by Texas Republican Representative Louis Gohmert; it failed 134–288. *Historic Voting Rights Act Extended*, *supra* note 548, at 16–8.

573. See Hasen Statement, *supra* note 21, at 8 (focusing on the necessity to pass a bill that “will . . . pass constitutional muster in the Supreme Court”); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 271 (2006) (statement of Theodore M. Shaw, Director–Counsel and President, NAACP Legal Defense and Education Fund, Inc.) (“After *Boerne* the Principal Constitutional Question Attending the VRA Renewal Is Whether Evidence of Continuing Discrimination Exists In Covered Jurisdictions.” (typeface altered)). The first question that Senate Judiciary Committee Chairman Arlen Specter asked Professor Richard Pildes to answer at length was: “Is there anything that Congress can do to ensure that the reauthorization of the Voting Rights Act is upheld by the Supreme Court under the ‘congruence and proportionality’ test articulated in *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)?” Pildes Statement, *supra* note 526, at 105 (emphasis omitted); see also Richard Hasen, *Pass the VRA Bailout Amendment*, ROLL CALL, July 11, 2006, available at <http://electionlawblog.org/archives/bailout.pdf> (arguing for bailouts likely to “insulate the the [sic] renewed VRA against inevitable constitutional challenge”).

574. For especially pertinent testimony on this point, see Travis County's Motion for Summary Judgment at 5–7, *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, No. 1:06-CV-01384 (D.D.C. May 15, 2007), available at <http://electionlawblog.org/archives/namudno-travis.pdf>.

575. Hasen, *supra* note 342, at 91. During the VRARA hearings, those concerned about *Boerne* focused on the diminishing numerator of the objection-rate equation. See, e.g., Hasen Statement, *supra* note 21, at 9 (“In the most recent 1998 to 2002 period, DOJ objected to a meager 0.05 percent of preclearance requests.”); Clegg Statement, *supra* note 495, at 22 (“[T]he percentage of objections since 1995 is less than 0.2 percent . . .”); U.S. COMM’N ON CIVIL RIGHTS, VOTING

organization of state and local governments endorsed the VRARA, an unequivocal indication of the fading of the problem of federalism.<sup>576</sup> In twenty-four years, only a dozen covered jurisdictions had bothered to take advantage of the eased bailout procedures in the 1982 law.<sup>577</sup> For white politicians, a willingness to comply with Section 5 gives them credibility with minority constituents and perhaps some protection against Section 2 suits.<sup>578</sup> For white officials in the Deep South, Section 5 has become more of a shield than a wound, an emblem of reformation more than an insult.

Because submissions by local governments—which made up the vast majority of them—were estimated to cost about \$500 each,<sup>579</sup> no doubt virtually all in employees' time spent compiling documents,<sup>580</sup> it is possible to determine the "federalism costs"<sup>581</sup> of complying with Section 5 literally. Approximately 20,000 submissions per year at \$500 per submission gives a total cost of roughly \$10 million. In 2004, local governments spent \$40,437,000,000 on employees' salaries.<sup>582</sup> Altogether, then, the cost of complying with Section 5 amounted to about a four-thousandth of the total salary expenses of local governments—much less than roundoff error.<sup>583</sup>

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RIGHTS ENFORCEMENT & REAUTHORIZATION, *supra* note 499, at 29 (emphasizing the decline in the number of objections from 161 per year in the period 1982–1994 to 13 per year in the period 1995–2004). But for issues of federalism, the denominator is more instructive.

576. See Tucker, *supra* note 12, at 252 n.481 (citing 152 CONG. REC. H5146 (daily ed. July 13, 2006)).

577. Hebert, *supra* note 519, at 266.

578. See *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 13 (2006) (statement of Donald M. Wright, Gen. Counsel, North Carolina State Board of Elections) [hereinafter Wright Statement] (noting that Section 5's preclearance requirements offer protection from litigation); Posner, *supra* note 480, at 66 n.64 (noting that bailout lawsuits could create minority opposition to white elected officials).

579. Hebert, *supra* note 519, at 271.

580. As the general counsel of the North Carolina State Board of Elections, Donald M. Wright, noted in Senate testimony, "The costs of preclearance submissions are insignificant, except for redistricting submissions," which were "very infrequent." Wright Statement, *supra* note 578, at 313. The average submission took "less than an hour to prepare and mail." *Id.* In North Carolina, he said, county elections directors considered Section 5 submissions "a manageable burden providing benefits in excess of costs and time needed." *Id.*

581. *Miller v. Johnson*, 515 U.S. 900, 926 (1995).

582. U.S. CENSUS BUREAU, GOVERNMENTAL EMPLOYMENT AND PAYROLLS: 1982 TO 2005, at 1, tbl.447, available at <http://www.census.gov/compendia/statab/tables/08s0447.pdf>.

583. Because few of the submissions come from states, I have left states out of both the numerator and the denominator in the calculation in the text. Even if state expenses for submissions were much higher than those for local governments, their very large employee-salary expenses would markedly reduce the overall percentage of governmental-salary expenses attributable to complying with Section 5. The calculation in the text thus no doubt overestimates federalism costs as a percentage of salaries.

### C. *Defeat in Victory?*

The course of the VRARA in Congress undercut the solemn praise with which its introduction was greeted and its passage was celebrated. The Republican leadership, which had maintained almost total control over its majority during the first six years of the George W. Bush Administration, had more trouble with Republican back benchers than with Democrats during consideration of the bill.<sup>584</sup> Before the Senate's one day of casual debate, a vociferous group of Republicans in the House, led by southerners whose party had been energized by the backlash against the VRA and other civil rights issues in the 1960s,<sup>585</sup> held up the VRARA for a month protesting against the targeting of the South through the bill's continuation of a coverage formula based on elections that took place decades earlier.<sup>586</sup> The southern conservatives found unlikely allies in liberal academics who worried that if the coverage and bailout formulas were not updated, the Supreme Court might declare part of the VRA unconstitutional under *Boerne*.<sup>587</sup> "Populist" opposition to illegal immigrants—who, of course, could not vote—fueled attacks on the provisions of the VRA for language assistance to citizens with imperfect English,<sup>588</sup> but it also drew attention away from Section 5. As in 1970 when the Nixon Administration lost both the

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584. See Tucker, *supra* note 12, at 235–47, 254–58 (recounting efforts of Representatives King, Westmoreland, and Norwood to delay or pass crippling amendments to the VRARA).

585. As Lee Atwater of South Carolina, eventually chairman of the Republican National Committee, put it: "As to the whole Southern strategy that Harry Dent and others put together in 1968, opposition to the Voting Rights Act would have been a central part of keeping the South [for the Republican Party]." Alexander P. Lamis, *The Two-Party South: From the 1960s to the 1990s*, in SOUTHERN POLITICS IN THE 1990S, at 1, 7 (Alexander P. Lamis ed., 1999).

586. See Todd J. Gillman, *Texans, Others Stall Voting Rights Renewal*, DALLAS MORNING NEWS, May 19, 2006, at A1 (describing the efforts of Georgia and Texas conservative Republicans to delay the debate); Raymond Hernandez, *After Challenges, House Approves Renewal of Voting Act*, N.Y. TIMES, July 14, 2006, at A1 (narrating House actions in 2006); Bob Kemper, *Charges Fly over Renewing '65 Law*, ATLANTA J.-CONST., July 10, 2006, at A1 (detailing congressional actions and arguments by Georgians); Shailagh Murray, *Voting Rights Act Extensions Pass House Despite GOP Infighting*, WASH. POST, July 14, 2006, at A1 (summarizing the final day's actions in the House); Patrick O'Connor, *Leaders Move Forward on VRA Vote Despite Some GOP Unease*, HILL, July 12, 2006, available at <http://thehill.com/leading-the-news/leaders-move-forward-onvra-vote-despite-some-gop-unease-2006-07-12.html> (recounting intra-Republican struggles); Lynn Westmoreland, Op-Ed., *Punitive Approach No Longer Needed*, ATLANTA J.-CONST., May 29, 2006, at A17 (arguing that Section 5 coverage should be based on the 2004 election).

587. See, e.g., Pildes Statement, *supra* note 526, at 200–07 (warning that the Supreme Court may not permit a reauthorization of Section 5 without strong evidentiary support that such measures are necessary); Hasen Statement, *supra* note 21, at 8–9 (arguing that after *Boerne*, Congress will have to provide a strong evidentiary record of intentional discrimination in order to support legislation that burdens states); Issacharoff Statement, *supra* note 518, at 220–21 (suggesting that in *Boerne* the Court limited Congress's power to enact discriminatory legislation); Hasen, *supra* note 573 (advocating bipartisan support for Westmoreland's amendment as a way of warding off an unfavorable ruling by the Supreme Court); Issacharoff, *supra* note 23, at 1714–20 (suggesting that the logic of *Boerne* and other recent seminal federalism cases would permit the reexamination of Section 5 of the VRA).

588. See Tucker, *supra* note 12, at 239–43, 256–57 (explaining connections between English-only bills and the VRARA).

termination of Section 5 and the Carswell Supreme Court nomination, the two objectives became entangled<sup>589</sup> and the 2006 conservatives reduced their small chances of success by attacking two very different provisions of the VRARA at once. The House passed the bill July 13, 2006, by a vote of 390–33, none of the proposed amendments garnering more than 185 votes.<sup>590</sup>

A week later, the Senate passed the House bill intact, 98–0.<sup>591</sup> Five days *after* the Senate vote, the Judiciary Committee issued its substantive report on the VRARA.<sup>592</sup> That report departed from convention in two striking ways. First, committee reports are generally published well *before* a bill is to be discussed on the floor, so that members can fully understand the often complex provisions and implications of bills.<sup>593</sup> Second, in bills with broad committee support, reports are typically the products of bipartisan cooperation. Not this time. Although during the extensive hearings on the bill, there had been a facade of bipartisanship on the Committee, after it passed, the Republican majority curtly rebuffed a 145-page Democratic draft, produced a perfunctory document, and refused to give the Democrats time to fashion a detailed dissent or even to show them a final draft of the majority report before it was published.<sup>594</sup> The Democrats were reduced to docketing

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589. See *supra* notes 99–102 and accompanying text.

590. Tucker, *supra* note 12, at 253–58.

591. *Id.* at 264.

592. See S. REP. NO. 109-295 (2006).

593. Senate Report 417, the Senate's much-cited report on the Voting Rights Act amendments of 1982, was published May 25, 1982. See S. REP. NO. 97-417 (1982). The Senate passed the Act on June 18. *Voting Rights Act Extended, Strengthened*, *supra* note 3, at 376. In 1965, the gap between issuing the substantive committee report and the final Senate vote was thirty-five days. *Voting Rights Act of 1965*, *supra* note 3, at 544–45. The convention is reflected in a quotation from an interview with an unnamed senator during the 1950s by Professor Matthews: "I try, and I think most other senators try . . . to read the report on a bill before voting on it . . ." MATTHEWS, *supra* note 4, at 251.

594. S. REP. NO. 109-295, at 54–55 (recording Democratic senators' objection to the Judiciary Committee Report); Letter from Patrick Leahy, Ranking Democratic Member, U.S. Senate Comm. on the Judiciary, to Arlen Specter, Chairman, U.S. Senate Comm. on the Judiciary 1 (July 25, 2006), *available at* <http://electionlawblog.org/archives/leahy.pdf> (requesting accommodation from Senator Specter so that Democratic senators could provide "additional and supplementary views"); Letter from Arlen Specter, Chairman, U.S. Senate Comm. on the Judiciary, to Patrick J. Leahy, U.S. Senate (June 26, 2006), *available at* <http://electionlawblog.org/archives/specter-response.pdf> (refusing Senator Leahy's request). An erstwhile friend of civil rights, Judiciary Committee Chairman Specter also provided ammunition to challenge its constitutionality in a floor speech. See Tucker, *supra* note 12, at 261, 265 (arguing that Senator Specter undermined the Act by suggesting it had achieved its goals and was no longer necessary). The most senior Republican on the Judiciary Committee when Senator Orrin Hatch reached his limit of six years as chairman of the Committee, Specter was bitterly opposed for the chairmanship after the 2004 election by conservatives who feared that he would block conservative judicial nominees. Sheryl Gay Stolberg, *Confirmation Battle in Senate Could Define Specter's Career*, N.Y. TIMES, July 3, 2005, at A1. In addition to holding a series of meetings with conservatives inside and outside the Senate, Specter named Michael E. O'Neill, a former clerk of Justice Clarence Thomas, as his chief counsel on the Judiciary Committee. *Id.* Apparently the crucial Judiciary Committee staffer on the VRARA was young Federalist Society member Dimple Gupta, whose appointment by Specter had been

a brief, angry sputter, and concluding that “post-passage legislative history is a contradiction in terms. Any after-the-fact attempts to re-characterize the legislation’s language and effects should not be credited.”<sup>595</sup> The majority report offered only weak support for the necessity of continuing Section 5 and fervently chastised the Justice Department’s interpretations and administration of the provision.<sup>596</sup> Even more unusually, two Republican members of the Judiciary Committee who had voted for the law filed further remarks that virtually invited the Supreme Court to overturn it.<sup>597</sup>

The lack of a debate or a conventional committee report in the Senate robbed friends of the VRARA of opportunities to embed evidence and arguments for the necessity and constitutionality of the law in comments on the floor or to demonstrate the will of Congress by explicitly rejecting amendments.<sup>598</sup> Despite all the civil rights forces’ planning, negotiating, researching, testifying, and compromising, the headlong rush to passage, which VRARA supporters were understandably reluctant to impede, reduced the significance of their overwhelming triumph for the arena that really mattered, the courts. In legislatures, adversity overcome builds legal cases;

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“cheered” by conservatives because of her coauthorship of the so-called nuclear option, a tactic for getting conservative judicial nominees approved by effectively overturning the Senate filibuster rule. The Prowler, *Keystone Capers*, AM. SPECTATOR, Mar. 7, 2005, [http://www.spectator.org/dsp\\_article.asp?art\\_id=7853](http://www.spectator.org/dsp_article.asp?art_id=7853). According to the conservative *American Spectator*, “She was hired to get the conservatives off our backs, says a Judiciary staffer.” *Id.* The extreme position that the “moderate” Specter took on the VRARA suggests that O’Neill, Gupta, and perhaps other Committee staffers influenced Specter’s and the Committee’s actions on the VRARA. Thus, in the House, the effort to avoid one conservative Judiciary Committee chairman sped up the bill, while in the Senate, the effort of a “moderate” to win the chairmanship of the Judiciary Committee may have helped to undermine the Act’s claim to constitutionality.

595. S. REP. NO. 109-295, at 55.

596. *Id.* at 10–22.

597. *Id.* at 25–53. The legislative director of the Washington, D.C., office of the ACLU accused the two of seeking “to lay out a roadmap to challenge the constitutionality of the law.” Tucker, *supra* note 12, at 266. One of the two, Senator John Cornyn, had been the attorney general of Texas when Gregory Coleman, the chief attorney for the plaintiffs in the *NAMUDNO* case, was the state’s solicitor general. *Id.* at 267 n.655. Coleman also testified against the VRARA. *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 20–21 (2006) (statement of Gregory S. Coleman, Att’y, Weil, Gotshal & Manges). Coleman’s place as a law clerk to Justice Clarence Thomas from 1995 to 1996 was filled the next year by the man who was in 2006 the chief counsel of the Senate Judiciary Committee, Michael O’Neill. Wikipedia, List of Law Clerks of the Supreme Court of the United States, [http://en.wikipedia.org/wiki/List\\_of\\_law\\_clerks\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States) (last modified Jan. 5, 2008). Representative Lamar Smith, in 2006 the ranking Republican member of the House Judiciary Committee, represented that part of Austin, Texas, that encompasses *NAMUDNO*. Tucker, *supra* note 12, at 267. As pointed out above in *supra* note 535 and accompanying text, the principal reason that VRARA was pushed in 2006 instead of 2007 was to avoid a possible Judiciary Committee chairmanship by Smith, who opposed renewal. Sometimes worlds are very small, indeed.

598. Tucker implies this point by observing its contrapositive—that the revolt of House back benchers created a more extensive record than if the bill had sailed through, thereby providing evidence of congressional deliberation for the inevitable legal challenge to the VRARA. See Tucker, *supra* note 12, at 258.



silence undermines them. The cost of tepid unanimity in Congress was a timid bill that only seemed a significant victory for the civil rights forces because they had recently seen so few, a victory deliberately undercut by conservatives aiming at winning in court what they did not dare to seek in Congress.<sup>599</sup>

## VII. Section 5 in Peril: The *NAMUDNO* Case

### A. *Miss Under Standing?*

Eight days after the former Austin, Texas, resident who was now president, George W. Bush, signed the VRARA, Gregory Coleman, a prominent member of the Federalist Society, former law clerk for Justice Clarence Thomas, and former solicitor general of Texas,<sup>600</sup> filed what the *Legal Times* called “the most significant assault on the Voting Rights Act in a quarter of a century” in the U.S. District Court for the District of Columbia on behalf of the Northwest Austin Municipal Utility District Number One (NAMUDNO).<sup>601</sup> One of 107 municipal and special-purpose districts in Travis County,<sup>602</sup> NAMUDNO was initially established in 1986 to provide water for a new, all-Anglo subdivision,<sup>603</sup> and in 2000, it served a 700-square-mile area of suburban tract housing that was home to only 1% of the county’s population.<sup>604</sup> The NAMUDNO area was 7% African-American or Latino.<sup>605</sup> While the first challenge to Section 5 in 1966 had been filed by a state, South Carolina, where the cannons trained on Fort Sumter still reverberated, the 2007 case came not from a whole state, and not from the

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599. Thus, Texas Republican Senator John Cornyn commented at the bill’s renewal, “I decided that any amendments would be defeated, so I decided not to offer any,” even though he complained that Texas should be released from the preclearance requirement for changing election rules. Samantha Levine, *Cornyn Decides Voting Rights Act Changes Doomed*, HOUS. CHRON., July 21, 2006, at A3.

600. *What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 117 (2003) (statement of Gregory S. Coleman, Partner, Weil, Gotshal & Manges LLP).

601. Emma Schwartz, *Texas District Says DOJ Oversight Is Unlawful*, LEGAL TIMES, Jan. 16, 2007, at 1, 1. An associate of prominent VRA opponent Edward Blum, Coleman convinced NAMUDNO to challenge the VRARA and took the case pro bono. *Id.* at 8.

602. Plaintiff’s Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 22, Nw. Austin Mun. Util. Dist. No. One v. Gonzales, No. 1:06-CV-01384 (D.D.C. May 15, 2007) [hereinafter Plaintiff’s Motion for Summary Judgment], available at <http://yalelawjournal.org/images/pdfs/plaintiff2.pdf>.

603. *See id.* at 35 (noting that African-Americans and Hispanics represented an estimated 0% of NAMUDNO’s general population in 1990).

604. Travis County’s Motion for Summary Judgment, with Accompanying Memorandum of Points and Authorities at 3, Nw. Austin Mun. Util. Dist. No. One v. Gonzales, No. 1:06-CV-01384 (D.D.C. May 15, 2007), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/SJ-TravisCounty1.pdf>; Schwartz, *supra* note 601, at 8.

605. Plaintiff’s Motion for Summary Judgment, *supra* note 602, at 35.

Deep South, but from a sparsely populated area of the most progressive county in a state that was as western as it was southern. NAMUDNO represented not states' rights but suburban secessionism.<sup>606</sup>

NAMUDNO had previously somewhat grudgingly complied with the VRA, submitting its eight minor election changes on time to the Department of Justice and never committing any serious voting rights infractions.<sup>607</sup> Coleman asked the court to allow NAMUDNO to bail out of Section 5 coverage, opposing the Justice Department's interpretation of the law as allowing only jurisdictions that registered voters, such as counties, to bail out.<sup>608</sup> But he would have been dismayed if the three Clinton appointees on the panel that he unluckily drew, Judges David S. Tatel, Paul L. Friedman, and Emmet G. Sullivan,<sup>609</sup> simply granted his petition to bail out. Whatever the composition of the panel, Coleman expected to lose the bailout issue.<sup>610</sup> The case, which attracted not only the forceful attention of the Justice Department but intervention and amicus briefs by all of the leading civil rights organizations, was really about whether the coverage formula of Section 5, under the conditions of 2007, violated *Boerne*.<sup>611</sup>

At the time of this writing, the case has been heard, but not yet decided, by the district court. Whatever the decision, it is certain to be appealed, and the case will probably appear on the docket of the U.S. Supreme Court in the midst of the extended 2008 presidential campaign and be scheduled for a decision by that Court not long before the two political parties' national conventions. If the Judicial Redeemers on the Supreme Court wish to overturn Section 5 but not to inflame minority voters on the eve of an election that will elect a president who might appoint up to three new members of the

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606. Travis County intervened in the case in opposition to NAMUDNO. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 1, Nw. Austin Mun. Util. Dist. No. One v. Gonzales, No. 1:06-CV-01384 (D.D.C. June 15, 2007) [hereinafter Plaintiff's Memorandum in Opposition], available at <http://www.projectonfairrepresentation.org/wp-content/uploads/2007/06/plaintiffs-memorandum-of-points-and-authorities-in-opposition-to-defendants-motions-for-summary-judgment.pdf>. In response, Coleman bristled that the Justice Department was "politically interposing Travis County between [NAMUDNO] and the State of Texas, which is [NAMUDNO]'s only supervisory authority under state law." *Id.* at 25.

607. See Plaintiff's Motion for Summary Judgment, *supra* note 602, at 7 (listing each of NAMUDNO's previous preclearance submissions).

608. See Plaintiff's Memorandum in Opposition, *supra* note 606, at 9 (opposing the Justice Department's reliance on a statutory definition of political subdivision based in part on voter registration). Complicating its argument that it was independent of Travis County for voting purposes, the district from 2004 on contracted with the county government to conduct its elections. *Id.* at 7-8.

609. See Pete Yost, *Texas Locals Challenge Voting Rights Law*, GUARDIAN (London), Sept. 17, 2007, available at <http://www.guardian.co.uk/uslatest/story/0,-6928892,00.html> (pointing out Clinton appointments).

610. Schwartz, *supra* note 601, at 9.

611. See Ana Radelat, *Fight over Voting Rights Act Expected to Reach High Court*, JACKSON CLARION-LEDGER, Oct. 23, 2006, at A1 (describing the filing of the case and the motives of the plaintiffs).

Court before 2012, they might decide to delay a decision by denying standing to NAMUDNO, finding that the Justice Department guideline that prevents NAMUDNO from bailing out is not an irrational interpretation of what Congress had the discretion to order. Separate bailouts for over a hundred special-purpose districts within a single county, and a like number of bailout requests from other areas, could shut down the District of Columbia District Court.<sup>612</sup> If only scattered districts, towns, or villages within a county bailed out, it might be a nightmare for counties to conduct elections. Either course would be a much worse federal burden on county governments than the current system, which is now a straightforward matter of bureaucratic routine. Consequently, the Supreme Court might decide that the suit could best be dealt with by dismissing it without reaching the *Boerne* questions.<sup>613</sup> Attorneys for the plaintiff, the defendant, and the amici could file away their papers until the election was over and new plaintiffs could be recruited, perhaps to face a new district court panel and a slightly different lineup on the Supreme Court.

#### *B. Moving the Policy Arguments to the Courts*

If the Supreme Court does not drain the legal life out of *NAMUDNO*, each side will reprise the arguments already raised in the VRARA hearings, in published scholarship, and to a much more limited extent, on the floor of Congress.

NAMUDNO began its motion for summary judgment in the district court by rewriting the states'-rights language of an earlier era in New South business terminology, as their predecessors in the nineteenth-century New South had reworked antebellum states'-rights language. Section 5, the

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612. See S. REP. NO. 97-417, at 57 n.192 (1982) (noting that "many thousands" of bailout actions would be filed if even the smallest political subunits could bail out separately).

613. The Supreme Court has often changed its standards or otherwise manipulated procedural doctrines to take jurisdiction or to avoid decisions. For instance, in *Shaw v. Reno*, 509 U.S. 630, 679 (1993) (Souter, J., dissenting), Justice O'Connor announced, according to Justice Souter, what was arguably a "new cause of action." This new claim allowed white plaintiffs standing to sue even though they had shown no injury. See *id.* at 659–60 (White, J., dissenting) (grounding his disagreement with the majority on the plaintiffs' failure to show injury). The majority seemed to contradict the decision a year earlier in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). For discussion of the contradiction, see KOUSSER, *supra* note 16, at 383–84. In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 17 (2004), the Court employed California family law to avoid making a decision on whether the phrase "under God" in the Pledge of Allegiance violated the Establishment Clause. The prevailing opinion in *Hein v. Freedom from Religion Foundation Inc.*, 127 S. Ct. 2553 (2007) preserved the White House Office of Faith-Based Programs from attack under the Establishment Clause by creating an exception to the forty-year-old standing rule in *Flast v. Cohen*, 392 U.S. 83 (1968). Six Justices held that *Flast* could not be distinguished. See *Hein*, 127 S. Ct. at 2573 (Scalia, J., concurring in the judgment) (decrying, in an opinion joined by Justice Thomas, "the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently" by the three-person plurality led by Justice Alito); *id.* at 2584 (Souter, J., dissenting) (rejecting, in an opinion joined by Justices Breyer, Ginsburg, and Stevens, the majority's conclusion that *Flast* did not apply in that case).

motion contended, “puts all covered states and political subdivisions into a form of federal receivership” led by “a federal shadow executive with veto authority.”<sup>614</sup> It was “perhaps the most intrusive abdication of core federalism principles anywhere in federal law.”<sup>615</sup> Conceding that Section 5 was “an extraordinary response to an extraordinary problem” in 1965<sup>616</sup> and, less fulsomely, that changes, including those in 1982, had not been ruled unconstitutional, Coleman characterized Section 5 as exclusively aimed at “discriminatory gamesmanship” by voting authorities and charged that Congress in 2006 had not properly identified which, if any, areas were still guilty of such practices.<sup>617</sup>

Even though the efforts of Congress to overturn *Bossier II* and *Ashcroft* might have been thought the strongest parallels to its attempt to reverse *Employment Division v. Smith*,<sup>618</sup> which provoked the ire of the majority of the Supreme Court in *Boerne*,<sup>619</sup> Coleman almost completely ignored the *Bossier II* and *Ashcroft* fixes, concentrating single-mindedly on Congress’s unwillingness to update the coverage formula or extend the Act for a shorter period.<sup>620</sup> Drawing a wavering line between state action and private action, he asserted that (selectively cited) comparable racial registration and voting rates proved a lack of discrimination by authorities, while continued racially polarized voting was purely private and therefore irrelevant to whether intentional discrimination by the state persisted.<sup>621</sup> Prophylactic effects of the current law on discrimination and gamesmanship, Coleman largely ignored,<sup>622</sup> as he did the slightness of the practical burden of submitting minor changes that were almost automatically approved.<sup>623</sup> Instead, he sought to create an atmosphere of abstract crisis, lamenting Section 5’s

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614. Plaintiff’s Motion for Summary Judgment, *supra* note 602, at 36.

615. *Id.* at 37.

616. *Id.*

617. *Id.* at 52, 47–52.

618. 494 U.S. 872 (1990).

619. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 454 (2000) (describing the *Boerne* majority as provoked by the overturning of *Smith*).

620. Plaintiff’s Memorandum in Opposition, *supra* note 606, at 54–58.

621. *Id.* at 47–50.

622. Indeed, he insisted that to justify the continuation of Section 5, Congress must have evidence of the conduct that it was designed to prevent. See *id.* at 62 (requiring congressional findings that covered jurisdictions that “have recently engaged in or are likely to engage in the kind of discriminatory gamesmanship on which Congress grounded its original passage of preclearance”).

623. The average annual expenditure for NAMUDNO for submitting its legal changes for preclearance was \$223. Memorandum in Support of Defendant’s Motion for Summary Judgment at 64, Nw. Austin Mun. Util. Dist. No. One v. Gonzales, No. 1:06-CV-01384 (D.D.C. May 5, 2007) [hereinafter Memorandum in Support of Defendant], available at <http://yalelawjournal.org/images/pdfs/def2.pdf>.

“unparalleled strain on our federal structure.”<sup>624</sup> And he contended that, in light of this strain, Section 5 could not be justified as a measure to prevent or deter voting discrimination unless the electoral procedures currently being resorted to by covered jurisdictions were “new and different.”<sup>625</sup>

In contrast to Coleman’s hyperbolic federalist abstractions, the legal papers of the Justice Department and the civil rights organizations brimmed with real-world examples of discrimination taken from Section 5 objections, requests for more information, and published and unpublished Section 2 and constitutional legal cases decided since the VRA had last been amended in 1982.<sup>626</sup> Mixing instances of disfranchising and diluting devices from every decade since 1982 and all covered states, especially Texas, the defendants and their friends sought to create the impression of widespread continuing discrimination at the same time that they asserted that but for the deterrent effect of Section 5, “countless” discriminatory voting changes would have been implemented in covered jurisdictions.<sup>627</sup> Because the evidence, which had been presented to Congress in 2006, was massive and, according to the Department and the civil rights groups, comparable to that used to justify previous renewals of the VRA, courts had no reason to come to a different conclusion than they had when they upheld the law in previous decisions.<sup>628</sup> Indeed, judges should be especially reluctant to depart from precedent in this

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624. Plaintiff’s Motion for Summary Judgment, *supra* note 602, at 52. He also sought to distinguish between prohibitions of state or local action, such as the Family and Medical Leave Act, upheld in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 721–22, 727–28 (2003), and the requirement of preclearance in Section 5, contending that the latter was more intrusive even though it allowed much more state action than an absolute prohibition of, for instance, all at-large elections would have. Plaintiff’s Memorandum in Opposition, *supra* note 606, at 58. Yet outright prohibitions would surely be less congruent and proportional to the injury of racial discrimination.

625. Plaintiff’s Memorandum in Opposition, *supra* note 606, at 49. Coleman did not claim textual or case-law authority for his novel interpretation, which would apparently put traditional discriminatory devices, such as at-large elections, racial gerrymandering, and annexations, outside the preclearance regime. He also ignored the fact that the ploys used by southern jurisdictions in the 1950s and 1960s were not “new and different” but were rather variations on practices of the period after the First Reconstruction. See KOUSSER, *supra* note 16, at 25–38. The history of racial discrimination in America is so long and deep that almost nothing is “new and different.”

626. See Memorandum of Points and Authorities in Support of Motion for Summary Judgment of Defendant-Intervenors, *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, No. 1:06-CV-01384 (D.D.C. May 15, 2007) [hereinafter Civil Rights Groups’ Points and Authorities], available at [http://www.citizen.org/documents/vrabrief\\_msj.pdf](http://www.citizen.org/documents/vrabrief_msj.pdf). The groups included the NAACP, NAACP-LDF, Lawyers’ Committee for Civil Rights Under Law, People for the American Way, ACLU, and Texas-Rio Grande Legal Aid; the Mexican American Legal Defense and Education Fund filed separately. See *id.* at 95–99.

627. Memorandum in Support of Defendant, *supra* note 623, at 41–67. The Defendant-Intervenors’ Joint Statement of Material Facts contains a four-hundred-page summary of the evidence of continued discrimination presented to Congress in 2006. Defendant-Intervenors’ Joint Statement of Material Facts, *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, No. 1:06-CV-01384 (D.D.C. May 15, 2007), available at <http://www.citizen.org/documents/vrafacts01.pdf>.

628. Memorandum in Support of Defendant, *supra* note 623, at 53–55, 60.

case because “Section 5 operates at the intersection of a citizen’s most fundamental right and a government’s most suspect classifications.”<sup>629</sup>

The outcome of the case at the Supreme Court level seems likely to turn on four questions. First, how radical is the majority of the Roberts Court willing to appear at this early stage of its tenure? To strike down a sacred symbol of the nation’s great moral movement of the twentieth century, one almost universally lauded by the civic elite, a law that had been recently renewed by triumphant majorities of Congress, would risk widespread denunciation and would greatly heighten the fears of constituencies for every other rights advance since women’s suffrage.<sup>630</sup> A backlash that turned the Supreme Court into a true voting issue for a substantial number of voters would be a real possibility, threatening the extension of the conservative majority on the Court. Second, will the Court’s majority assess the federalism costs of Section 5 practically or as a matter of pure principle? In practical terms, Section 5 has never been much of a burden: at the beginning because it was not enforced and more recently because compliance with it has been built into simple bureaucratic routines—another, rather-easy form to fill out, now online.<sup>631</sup> As a matter of principle, the unwritten strictures of federal–state separation are no more or less violated by Section 5 than they ever were, but the Roberts majority may construe them more strictly than the Warren, Burger, or Rehnquist Courts did. Third, how will the Court’s dominant five members weigh the plentiful, but scattered evidence of continued discrimination, and how will it solve the conundrum of the prophylactic effect of Section 5? Will it refuse to conclude that, as the brief of the civil rights organizations characterized the plaintiffs’ argument, “Section 5 has been so successful that it must be struck down”?<sup>632</sup> Or will the majority become “supreme social psychologists,” predicting that no increase in discrimination would follow a repeal of Section 5 because the hearts of the public and politicians are by now truly free of discriminatory desires? Fourth, how will the Court as a whole treat the coverage and sunset provisions of the VRARA—the facts that the jurisdictions covered did not change

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629. *Id.* at 55–56. For a more extensive discussion of the point, see Karlan, *supra* note 482, at 13–14. The plaintiffs attempted to circumvent the “fundamental right to vote” point by contending that the Fifteenth Amendment did not prohibit vote dilution. Plaintiff’s Memorandum in Opposition, *supra* note 606, at 54. This position was espoused by Justices Thomas and Scalia in *Holder v. Hall*, 512 U.S. 874, 919–22 (1994) but rejected by implication by the other Justices in that and subsequent cases.

630. It is worth noting that NAMUDNO has not asked the district court to strike down the VRARA on “colorblind” grounds. A Supreme Court decision to do so, especially on its own initiative, would be truly radical.

631. See Memorandum in Support of Defendant, *supra* note 623, at 64 (referring to online submission).

632. Civil Rights Groups’ Points and Authorities, *supra* note 626, at 28.

in 2006 and that the law was extended for another lengthy period?<sup>633</sup> How will it assess the issue of possible under- and over-inclusiveness of coverage, and how will it decide if twenty-five years is too much or just enough, or if the decision should properly be left to Congress?

Neither side in the *NAMUDNO* case discussed expanding coverage to different counties—the plaintiffs because they wished to eliminate *all* coverage,<sup>634</sup> the defendants because they wished to justify current coverage and because they wanted to keep the historical justification for coverage that the Supreme Court had accepted in past cases.<sup>635</sup> This reticence on both sides suggests an opening for the Justices to overturn the VRARA as incongruent with the problem of racial discrimination in electoral processes and structures with a decision, perhaps joined in by members of both the moderate and conservative wings of the Supreme Court, that would serve to invite Congress to expand as well as to contract the coverage of Section 5—to correct both under- and over-inclusiveness.<sup>636</sup> That opportunity might also be used by civil rights forces to adopt other changes that would modify state and local electoral practices in order to outlaw those that discriminate against minorities.

*C. If NAMUDNO Wins: The Frederick Douglass, Thaddeus Stevens, and Charles Sumner VRA Revival Act of 2009*

When Gregory Coleman filed the *NAMUDNO* case on August 4, 2006, Republicans controlled both houses of Congress and the presidency, and if the 2006 elections for Congress went the same way as nearly all of those since 1994 had, Representative Lamar Smith and Senator Arlen Specter—opponents of Section 5—would chair the judiciary committees of the House and Senate. Thus, any proposals for revisions of the VRA prompted by a decision by the Supreme Court in *NAMUDNO*'s favor would face dim prospects in Congress. Yet even in early August, pundits were beginning to

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633. As Pildes puts it, by refusing to change the coverage scheme or renewal period out of reasons of “realpolitik,” Pildes, *supra* note 7, at 154, “Congress has, whether intentionally or not, in effect thrown down a gauntlet to the Court,” *id.* at 153.

634. Plaintiff’s Memorandum in Opposition, *supra* note 606, at 42.

635. See generally *City of Rome v. United States*, 446 U.S. 156, 173–83 (1980); *Briscoe v. Bell*, 432 U.S. 404, 414–15 (1977); *South Carolina v. Katzenbach*, 383 U.S. 301, 327–37 (1966); Memorandum in Support of Defendant, *supra* note 623, at 10 (citing *Lopez v. Monterey County*, 525 U.S. 266, 283–85 (1999)).

636. In her larger study and a short comment on Persily, *supra* note 483, Ellen Katz defends the VRARA on the grounds that there were still many Section 2 cases in jurisdictions covered by Section 5 and that plaintiffs won a larger percentage of Section 2 cases filed in those than in currently noncovered jurisdictions. Katz, *supra* note 241, at 215–17; Ellen D. Katz, *Mission Accomplished?*, 117 YALE L.J. POCKET PART 142, 146–47 (2007), <http://yalelawjournal.org/images/pdfs/613.pdf>. While this evidence suffices to defeat the utopian contention that the Old South has been revolutionized, it does not meet the argument that *some* of the currently covered areas could be released without consequences for minorities, while some places not currently subject to Section 5 need to be.

predict that Democrats might win a majority in the House and perhaps even the Senate,<sup>637</sup> and when those tentative predictions came true, the new chairmen of the judiciary committees—John Conyers, the senior African-American in the House, and Patrick Leahy, a trusted friend of minority voting rights—and new partisan majorities would be the first to consider any revisions of the VRA. What must have seemed graveyards for the VRA at the time *NAMUDNO* was first being planned had become potential houses of recovery.

A Supreme Court decision overturning Section 5 on *Boerne* grounds in 2008 would present a new President and Congress in 2009 with the welcome opportunity to amend the law by adding new reforms, as well as more precisely tailoring its coverage scheme and reducing its renewal length, the latter prodding Congress into more frequent reversals of Supreme Court opinions it believes errant. In the event of such a decision, Congress, following the 2006 precedent of naming the amended Act for prominent civil rights supporters, should consider emphasizing the historical path of discrimination and struggles against it in the nation as a whole, not just in the South, by naming the revision for three then-prominent, but now largely forgotten nineteenth-century abolitionists. Frederick Douglass, escaped slave, brilliant writer and lecturer, the most prominent African-American spokesperson in the nineteenth century, should be as well known as he once was for his struggles against Jim Crow and for black suffrage in the antebellum North, as well as throughout the country after emancipation.<sup>638</sup> Thaddeus Stevens, fearless defender of escaped slaves, framer of universal public education, scourge of secessionists and their northern sympathizers, merits rescue from the caricature that his racist enemies popularized.<sup>639</sup> Charles Sumner, foremost sponsor of school integration in the North and the nation in the nineteenth century, near martyr to southern violence on the Senate floor, a man whose dying wish that colleagues pass the Civil Rights Bill that he had sponsored for so long was granted, deserves another legislative memorial.<sup>640</sup> To emphasize the grounding of the VRA in the nation's turbulent history of race relations, the members might also want to consider having actual historians testify about the Act, as they did not in 2006.

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637. E.g., Charlie Cook, *The Gathering Storm*, NAT'L J., Aug. 5, 2006, at 68, 68, available at <http://www.cookpolitical.com/column/2006/080506.php>.

638. See generally, e.g., FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* (Arno Press 1968) (1855); NATHAN IRVIN HUGGINS, *SLAVE AND CITIZEN: THE LIFE OF FREDERICK DOUGLASS* (1980); JAMES OAKES, *THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS* (2007).

639. See generally, e.g., FAWN M. BRODIE, *THADDEUS STEVENS: SCOURGE OF THE SOUTH* (1959); HANS L. TREFOUSSE, *THADDEUS STEVENS: NINETEENTH-CENTURY EGALITARIAN* (1997).

640. See generally, e.g., DAVID HERBERT DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* (1960); DAVID HERBERT DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* (1970).



As many observers noted during the preparations for the VRARA, as well as during the hearings, the coverage provisions are the most likely to attract skepticism by the judiciary.<sup>641</sup> Linguistically, *Boerne*'s "congruence" matches the coverage provisions of the VRA better than any other section, and the fact that most of the affected jurisdictions were designated partly on the basis of turnout at elections from thirty-four to forty-two years before 2006 invites doubts. That more than half of the published Section 2 cases since 1982 have come from jurisdictions not covered by Section 5<sup>642</sup> suggests that racial discrimination in voting rules is not limited to areas previously singled out for skepticism. Like cases brought in the Deep South under the 1957 and 1960 Civil Rights Acts, the Section 2 and constitutional cases have often been expensive and lengthy, and they frequently involved retrogressive changes that would have been inhibited had the areas been covered by Section 5.<sup>643</sup>

Two examples are suggestive. In 1988, the ACLU and the Mexican American Legal Defense and Education Fund (MALDEF) began planning a lawsuit to redraw the five districts of the Los Angeles County Board of Supervisors, the nation's largest local government.<sup>644</sup> Even though the population of Los Angeles County was 38% Latino in 1990, no one with a Spanish surname had been elected to the county's governing body since 1874.<sup>645</sup> In *Garza v. County of Los Angeles*,<sup>646</sup> MALDEF and the ACLU, joined by the Justice Department, showed that Anglo supervisors who were generally sympathetic to Latino interests, but who prized their own reelection even more, repeatedly redrew district lines to insure that no Latino could be elected.<sup>647</sup> That their actions were not regarded as different in kind from those in covered jurisdictions is evidenced by the fact that after 1991,

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641. See, e.g., Hasen Statement, *supra* note 21, at 9 (suggesting that the Supreme Court might insist on evidence that discrimination was not only still present in covered jurisdictions but that it was greater there than in other jurisdictions); Issacharoff Statement, *supra* note 518, at 221, 220–21 (warning that the Supreme Court may be skeptical of the need for certain jurisdictions to be covered and others not subject to preclearance because "[t]he clear record of geographic demarcation no longer exists"); Hasen, *supra* note 342, at 88–89 (arguing that the success of Section 5 in curtailing discrimination against voters may make it difficult for Congress to demonstrate the necessity of its continuance).

642. Katz, *supra* note 241, at 215.

643. Cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (finding a justification for Section 5 in the fact that an "inordinate amount of time and energy [was] required to overcome the obstructionist tactics invariably encountered" in litigation under the 1957 and 1960 Civil Rights Acts).

644. The lawsuit was decided more than three years later and cost taxpayers \$12.8 million. Richard Simon, *County to Pay \$6.3 Million in Voting Rights Lawsuit Settlement*, L.A. TIMES, May 3, 1991, at B3.

645. KOUSSER, *supra* note 16, at 72, 77.

646. 756 F. Supp. 1298 (C.D. Cal. 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990).

647. As the expert witness for the plaintiffs on intent, I analyzed the evidence and developed the intent case. A later version of my report in that case comprises Chapter 2 in KOUSSER, *supra* note 16.

standard Justice Department Section 5 objection letters cited the *Garza* purpose analysis as definitional.<sup>648</sup> Another, more recent example comes from Osceola County, Florida, where an unexpected influx of predominantly Puerto Rican Latinos raised the Latino percentage in this uncovered jurisdiction from 2% in 1980 to more than 30% by 2000, resulting in the election of a Puerto Rican county commissioner, followed by an intentionally discriminatory shift from single-member districts to at-large elections.<sup>649</sup> No amount of pressure from the Justice Department could convince the county to settle the lengthy and expensive lawsuit,<sup>650</sup> which the county predictably lost.<sup>651</sup>

To expand and contract the coverage of Section 5 under the close watch of the courts, it would help to articulate a new theory of discrimination. Section 5 has been based on the premise that the states and counties that are most likely to institute new discriminatory devices could be predicted from two factors—historical experience<sup>652</sup> and the proportion of the population whose native language is not English.<sup>653</sup> Although the rationale for using historical experience as a predictor has not been explicitly laid out, it could be characterized by two propositions—that electoral discrimination is a product of deep-seated cultural racism, or that it is a product of a struggle for power that is likely whenever a minority group reaches some demographic threshold, or both.

For the first thirty years of the VRA, these two factors were so closely correlated as to make it fruitless to try to distinguish them. Current conditions and a consideration of nineteenth-century disfranchisement, however, allow us to choose between the cultural and power explanations of electoral discrimination. Doing so will not only provide a more solid rationale for the Section 5 coverage scheme, but it will also dispel the view that normal politics can now be trusted to protect minority political rights everywhere.<sup>654</sup>

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648. *E.g.*, Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to George Daly, Att’y 2 (Sept. 23, 1991) (on file with the Texas Law Review).

649. *United States v. Osceola County*, 475 F. Supp. 2d 1220, 1222–25 (M.D. Fla. 2006).

650. Osceola County spent nearly \$2 million on this suit, which lasted for two years. Periwinkle, Editorial, *A Win-Win for Osceola*, ORLANDO SENTINEL, Dec. 6, 2006, at A14; *Judge Orders Hearing on Voting Districts*, ORLANDO SENTINEL, Nov. 28, 2006, at B3.

651. *Osceola County*, 475 F. Supp. 2d at 1235. The facts of intentional discrimination in Osceola County are contained in Declaration of Dr. J. Morgan Kousser, *United States v. Osceola County*, No. 6:05-CV-0053-ORL-31DAB (M.D. Fla. Mar. 2, 2006) (on file with the Texas Law Review).

652. *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Rodríguez, *supra* note 17, at 805–06, 805 & n.217, worries that expanding the coverage of Section 5 might seem to courts to divorce it from the historical experience stressed in *Katzenbach* and other cases.

653. The two proxies that the 1965 Act used for historical experience—turnout in the 1964 presidential general election and the employment of a literacy test in English—are of diminishing relevance to evolving conditions that are likely to produce electoral discrimination, especially the growth of Latino populations.

654. See Issacharoff, *supra* note 23, at 1714 (suggesting that the VRA may no longer be needed because partisan politics can protect minority rights).

The devices that most depress or threaten to depress minority political participation today, criminal disfranchisement and voter-identification laws, deeply divide the two major political parties, one dependent on black and brown support, the other often scorning it.<sup>655</sup> Wherever Republicans are in control, they will have an incentive to pass, strengthen, or at least preserve each type of measure.<sup>656</sup> And the disfranchisement of African-Americans in the South in the late nineteenth and early twentieth centuries, the principal instance of disfranchisement of a large already-enfranchised group in American history and the target of the VRA, was driven by partisan as well as racial motives to establish white *Democratic* supremacy.<sup>657</sup> History teaches us that partisanship is not a cure for racist practices, but a cause.

Examination of coverage expansion before and during congressional hearings would provide more solid evidence for the necessity of continuing Section 5 by encouraging the investigation of areas where tendencies to pass discriminatory devices have not been inhibited for over forty years by the specter of preclearance. It would uncover numerous examples of intentional discrimination, satisfying the Supreme Court precedents since *Washington v. Davis* that the Fourteenth and Fifteenth Amendments are violated only by intentional discrimination. It would lessen any opprobrium attached to coverage by showing that the adoption and employment of discriminatory devices has taken place in areas and at times in which invidious expressions of discrimination are rare, that such discrimination is more a matter of power than of prejudice—that Bull Connor may be dead,<sup>658</sup> but Tom DeLay is

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655. See Tracie Powell, *Why Republican Presidential Candidates Skipped the Morgan State Debate*, DIVERSE: ISSUES HIGHER EDUC., Sept. 27, 2007, [http://diverseeducation.com/artman/publish/article\\_9612.shtml](http://diverseeducation.com/artman/publish/article_9612.shtml) (discussing the failure of 2008 Republican presidential candidates to attend debates sponsored by historically black colleges and organizations focused on minority issues).

656. For a sampling of the partisan/racial battles over voter identification, see Nancy Badertscher & Carlos Campos, *Legislature 2005: ID Debate Gets Heated: Some Lawmakers Say Bill Could Be Disenfranchising*, ATLANTA J.-CONST., Mar. 13, 2005, at E4; Reginald Fields, *Voter ID Bill Gets Taft's Signature: Legislative Approval Follows Party Lines*, PLAIN DEALER (Cleveland, Ohio), Feb. 1, 2006, at B3; Jo Mannies, *Measure to Require Photo IDs Stirs Outcry*, ST. LOUIS POST-DISPATCH, Feb. 12, 2006, at B1; R. Jonathan Tuleya, *Democrats Not Happy About Voter ID Law*, DAILY LOC. NEWS (Chester County, Pa.), Feb. 3, 2006, at A1; Tom Scheck, *Voting Bill Stirs Strong Emotions at Capitol*, MINN. PUB. RADIO, Mar. 15, 2006, <http://minnesota.publicradio.org/display/web/2006/03/15/voting>.

657. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910*, at 238 (1974) (“The system which insured the absolute control of predominantly black counties by upper-class whites, the elimination in most areas of parties as a means of organized competition between politicians, and, in general, the nonrepresentation of lower-class interests in political decision-making was shaped by those who stood to benefit most from it—Democrats, usually from the black belt and always socioeconomically privileged.”).

658. Richard Hasen’s picturesque expression captured a thought so well as to become an instant cliché. See Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 188 (2005); see also *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H.*

not.<sup>659</sup> It would shift more of the focus of federal antidiscrimination legislation from African-Americans to the growing, spreading minority, Latinos, making the Act more congruent with changing discriminatory practices.<sup>660</sup> It might allow for the automatic bailout of many nearly all-white southern counties in which discrimination has always been a minor theme because there is so little real power at stake. And it would anchor the coverage formula in a coherent theory of discrimination, based on long historical experience from the disfranchisement of African-Americans at the turn of the twentieth century through the latest redistrictings and shifts from single-member districts to at-large elections. Thus, Supreme Court invalidation of Section 5 under *Boerne* might, ironically, make it politically feasible to pass an amended VRA that is truly congruent and proportional to the existing and developing threats to racial political equality.

#### VIII. “History Can Move Backward”

When C. Vann Woodward testified before a House judiciary subcommittee in favor of the renewal of the VRA in 1981, he brought his appreciation for irony as well as his deep knowledge of the importance of public policy in shaping the country’s racial past to his remarks. Asked whether the “Progressive Era,” when many of the at-large-election structures at issue in VRA suits were erected, deserved its name, he answered:

I think one of the great and pathetic ironies of our history is that the most reactionary period of racial legislation got tied with the name of “progressivism.” That was the period when the great bulk of the discriminatory laws about voting and civil rights were put on the books, when the northern opinion was most lax and permissive about those laws.<sup>661</sup>

Asked “What is the lesson about the first [R]econstruction and why should we be concerned about that in 1981?” Woodward replied:

I think for one thing that it makes evident and clear that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made.

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*Comm. on the Judiciary*, 109th Cong. 4 (2005) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project) (“I have been struck with the fact that invariably someone will say we don’t need section 5 anymore because Bull Connor is dead.”).

659. For DeLay’s role in designing the 2003 Texas re-redistricting struck down for discrimination against Latinos in *LULAC*, see Stuart Taylor Jr., *The Trouble with Texas*, NAT’L J., Mar. 6, 2006, at 13.

660. Rodríguez, *supra* note 17, at 809–10.

661. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2024 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University).

The first [R]econstruction cost us our greatest bloodshed and tragedy. It would seem that if anything has been paid for at a higher price, it was these advances. And yet, they were eroded and lost, and only a century later they were restored.

My history teaches me that if it can happen once, it can happen again.<sup>662</sup>

Ironies warn us to beware of dimly foreseen or vehemently denied consequences, to reject trades of uncertain, but adverse long-term results for assured short-term advantages, and to be as skeptical of triumphs as we are alert to opportunities to turn defeats into victories. They counsel us to let thoroughly analyzed experience, rather than ideology or simplistic principles, be our final guide to action. The jerky, often-reversed course of modern voting rights history reminds us never to count on present trends, rely on the inevitable success of truth or right principles, or forget that justice is a self-conscious political construction. The future cannot be shaped all at once, once and for all, but needs constant reanalysis and readjustment. Perfection in the institutions of voting rights—indeed, in *any* institutions—is a dangerous myth; there is only the repeated correction of imperfections. As long as there is discrimination, there will always be more work to do.

*For further discussion of this Article, visit [www.texasrev.com/seealso](http://www.texasrev.com/seealso).*

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662. *Id.* at 2027.